

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 37

LIBRARY
SUPREME COURT, U.S.

LLOYD A. FRY ROOFING COMPANY, PETITIONER,

vs.

SCOTT WOOD, R. B. McCULLOCH, JR., AND JOHN R.
THOMPSON, INDIVIDUALLY AND AS MEMBERS
OF AND COMPOSING THE ARKANSAS PUBLIC
SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ARKANSAS

PETITION FOR CERTIORARI FILED APRIL 21, 1952

CERTIORARI GRANTED JUNE 2, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

LLOYD A. FRY ROOFING COMPANY, PETITIONER,

vs.

SCOTT WOOD, R. B. McCULLOCH, JR., AND JOHN R. THOMPSON, INDIVIDUALLY AND AS MEMBERS OF AND COMPOSING THE ARKANSAS PUBLIC SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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[fol. 1] **IN THE PULASKI CHANCERY COURT**

[Caption omitted]

[fol. 2] **IN THE PULASKI CHANCERY COURT, FIRST DIVISION**

No. 88841

LLOYD A. FRY ROOFING COMPANY, Complainant

v.

SCOTT WOOD, R. B. McCULLOCH, JR. AND JOHN R. THOMPSON, Individually, and as Members of and Composing the Arkansas Public Service Commission, Defendants

COMPLAINT—Filed May 10, 1950

Complainant, Lloyd A. Fry Roofing Company, for cause of action respectfully shows to the Court:

I

Complainant, Lloyd A. Fry Roofing Company, is a Delaware Corporation, with offices and places of business in a number of states, and with an office, place of business and manufacturing plant at Memphis, Tennessee, at which point it manufactures and distributes roofing and allied supplies and materials to points in a number of states, including points in the State of Arkansas.

II

The Arkansas Public Service Commission is a Commission created by the Legislature of the State of Arkansas under and by virtue of Act No. 40 of 1945, and vested with the authority to administer the Arkansas Motor Carrier Act, 1941 (Act No. 367 of 1941). The individually named defendants hereinafter referred to as the Commission, are the duly appointed, qualified and acting members of the Arkansas Public Service Commission.

[fol. 3]

III

Under and by virtue of the provisions of the Arkansas Motor Carrier Act, 1941, the defendant Commission is

gested with power and authority, as set forth in said act to regulate common and contract carriers by motor vehicle, as such terms are defined in sec. 5(a) of said Act. Such definitions, insofar as here pertinent, are as follows:

"Sec. 5. (a) as used in this Act—

(7) The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or indirectly, or by a lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, *for the general public by motor vehicle for compensation whether over regular or irregular routes.*

(8) The term 'contract carrier by motor vehicle' means any person, not a common carrier included under paragraph 7, sec. 5(a) of this act who or which, under individual contract or agreements, and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement, *transports passengers or property by motor vehicle for compensation.*" (Emphasis supplied)

IV

Under the terms and conditions of the Arkansas Motor Carrier Act, 1941, it is specifically provided that the Commission shall have no authority to regulate any *private carrier of property*, in that, it is provided:

"Sec. 5. (b) nothing in this Act shall be construed to include . . . or (3) any private carrier of property;"

By Sec. 25 of said Act it is provided:

"The terms and provisions of this act shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

[fol. 4]

V

The complainant, Lloyd A. Fry Roofing Company, is neither a common nor contract carrier within the definitions of such terms contained in the Arkansas Motor Carrier Act, 1941, or Part II of the Interstate Commerce Act enacted by the Federal Congress (U. S. Code, Title 49, Secs. 301, et seq.)

VI

From its plant at Memphis, Tennessee, complainant sells and distributes its merchandise to points in a number of states, transporting and delivering a portion of such merchandise by motor vehicles. Insofar as the movement of plaintiff's merchandise in the State of Arkansas is concerned, all of such merchandise is being delivered to points in Arkansas from points outside Arkansas, or is being transported through Arkansas from points outside thereof to points outside thereof, and, in each instance, the transportation of complainant's merchandise is an interstate commerce. In the performance of such interstate transportation complainant is a private carrier of property by motor vehicle, as such term is defined in Part II of the Interstate Commerce Act enacted by the Federal Congress, U. S. Code, Title 49, Sec. 303 (17), as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

VII

Except insofar as qualifications and maximum hours of [fol. 5] service of employees and safety of operation or standards of equipment are concerned the United States Government has not attempted to regulate, supervise or control the operations of private carriers, and with all reg-

ulations and requirements of the United States Government complainant has been and is in full compliance.

VIII

Under and by virtue of the terms and conditions of a long term written equipment lease, a true and correct copy whereof is attached hereto as Exhibit "A", complainant Lloyd A. Fry Roofing Company, in the transportation of its property in interstate commerce, uses motor vehicle equipment furnished pursuant to said lease by Frank E. Whittington, Inc., which equipment is at all times under the immediate and direct supervision and control of complainant, and is operated entirely by complainant's employees who are insofar as transportation in the State of Arkansas is concerned, engaged solely in the transportation of complainant's property in interstate commerce.

IX

Complainant respectfully shows to the court that as provided by Exhibit "A" hereto complainant, as lessee, leases said motor vehicle equipment for a term of three years; all of same is licensed in the name of complainant; same is operated solely and exclusively in the transportation of complainant's merchandise, by drivers employed by complainant who are exclusively directed and controlled by complainant, who are carried upon complainant's payroll records as its employees, drivers for whom complainant provides workman's compensation insurance and who participate in all employee benefit plans such as group [fol. 6] insurance and paid vacations, and from whose earnings complainant deducts withholding and social security taxes. Complainant, as lessee of said motor vehicle equipment provides public liability and property damage insurance covering the operation thereof, and complainant and its employees are solely and alone responsible for the merchandise being transported.

Complainant avers and would respectfully show to the court that in the transportation of its property in motor vehicle as aforesaid that complainant is a private carrier of property by motor vehicle in interstate commerce.

X

Notwithstanding, however, the expressed intent of the legislature of the State of Arkansas that the Arkansas Public Service Commission should have no jurisdiction over the operations of private carriers, said Commission, arbitrarily, illegally and without any semblance of authority has, by and through its agents, servants, attorneys and enforcement officers, acting under the direction and control of said Commission, and without the Commission having utilized the administrative procedure available to it by the filing of any charge against complainant alleging any supposed violation of Arkansas law or regulations, and without the Commission having exercised the authority vested in it under the Arkansas Motor Carrier Act, 1941, to seek injunctive relief in a court of competent jurisdiction against the continuation of any violation of the Act, the Commission has launched upon a program of harassment and interference with complainant's operations and the lawful and orderly transportation and delivery of [fol. 7] its property in interstate commerce.

In the carrying out of said illegal and oppressive program the Commission, acting through its agents and servants, has been lying in wait for complainant's vehicles endeavoring to transport complainant's property in interstate commerce in the State of Arkansas, arresting its drivers, impounding its equipment and merchandise, preventing the fulfillment of contracts for the delivery of merchandise by complainant, causing complainant to be forced to defend a multitude of prosecutions, and causing, as well, irreparable injury to complainant in its efforts to lawfully and orderly sell and distribute its merchandise and carry on its lawful endeavors.

XI

Complainant avers and would show to the court that said program upon which the Commission has launched and the orders and directions of the Commission issued pursuant thereto, as well as the actions and conduct of the Commission, its agents and representatives, exceed the power and authority of the Commission, contravene the

legislative enactments of the State of Arkansas, deprive the complainant of equal protection of the laws, in violation of the Constitution of the State of Arkansas and the Constitution of the United States, deprive the complainant of its property without due process of law in contravention of the Constitution of the State of Arkansas and the Constitution of the United States, and, as well, that this illegal, unauthorized and unjustified program of alleged enforcement of the Arkansas Motor Carrier Act, 1941, contravenes the Commerce Clause of the Constitution of the United States, and constitutes an undue and [fol. 8] unreasonable burden upon interstate commerce.

XII

Complainant further avers that by the foregoing illegal, unconstitutional and arbitrary action of the Commission that it is suffering irreparable injury, that it has no plain and adequate remedy at law, and complainant has been advised and avers that unless enjoined from so doing by this honorable court that complainant's drivers will continue to be arrested, complainant's property will continue to be impounded, and that it will be impossible for complainant to continue to engage in the lawful manufacture and distribution of its merchandise to and through the State of Arkansas. As a result of said unlawful program and course of conduct there are now pending against complainant's drivers and employees a number of prosecutions in justice of the peace courts, as well as one which has been appealed to the Circuit Court of Lonoke County, and that daily the defendants are seeking to initiate additional such prosecutions, all predicated upon the arbitrary, unlawful and untenable position that complainant is not a private carrier.

Wherefore, premises considered, complainant prays:

1. That this complaint be filed, and that all proper process issue requiring the named defendants, as members of and composing the Arkansas Public Service Commission, to appear and answer this complaint at the earliest date permitted by the rules of this court, but not on oath, same being waived.

2. That immediately upon the filing hereof a restraining order be issued by direction of the court restraining the defendants, their agents, servants, representatives, employees and attorneys from molesting, interfering with, or hindering, in any particular, plaintiff or its drivers in the [fol. 9] transportation of plaintiff's property by motor vehicle in the State of Arkansas in equipment leased to and operated by complainant and its drivers under the lease attached hereto as Exhibit "A", and restraining, as well, the further prosecution of pending criminal actions against complainant or its representatives or employees during the pendency of this cause.

3. That upon the final hearing hereof a permanent injunction issue restraining and enjoining the defendants, their successors, agents, servants, representatives, employees and attorneys, as aforesaid.

4. And complainant prays for such other, further, and general relief to which it in the premises may be entitled.

/s/ Louis Tarlowski, Rector Building, Little Rock, Arkansas, /s/ James W. Wrape, /s/ Glenn M. Elliott, 1804 Sterick Building, Memphis, Tennessee, Attorneys for Complainant.

[fol. 10] *Duly sworn to by Leon Hecht. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO COMPLAINT

Leasing Agreement

This contract, by and between Frank E. Whittington Co., a corporation, with its office and principal place of business in the City of Memphis, Tennessee, hereinafter referred to as Lessor, and Lloyd A. Fry Roofing Company, a corporation with a place of business and office in Memphis, Tennessee, hereinafter referred to as Lessee, Witnesseth:

That in consideration of the promises of the parties, each to the other, and in accordance with the terms and conditions as hereinafter set forth Lessor agrees to lease,

and does, lease, to the Lessee, certain motor vehicle equipment, more particularly described below.

It is expressly understood and agreed that this is a contract of leasing only and that Lessee has by these presents acquired no right, title or interest in or to the property described in this agreement.

Terms and Conditions:

1. The equipment which Lessor agrees to furnish to the Lessee consists of tractor-tandem truck units, which units are more particularly described in Schedule "A" attached hereto, together with any additional Schedule "A"'s now or hereafter attached hereto, which said Schedules are herein collectively referred to as Schedule "A", and are made a part hereof by reference thereto the same as if rewritten at length herein.

2. Lessor agrees, at its own cost and expense, unless otherwise expressly provided in this agreement to provide complete, suitable and adequate garage service, including washing, polishing, cleaning, oiling, greasing, inspection and storage space for said vehicles; to provide all necessary state and city license tags for the state and city in which the vehicles be leased for use; to maintain said vehicles and all vehicles which may hereafter be substituted for any of such vehicles, and all vehicles supplied as additional vehicles, in good repair, mechanical condition and running order; to furnish all necessary fuel, oil and other lubricants necessary for the operation of such vehicles; and to keep the painting and lettering on such vehicles in such condition that they shall at all times present a neat appearance. Any vehicle accepted by Lessee for use under this agreement, shall, unless Lessee gives immediate written notice to the contrary, be conclusively presumed to have been in good repair, mechanical condition and running order when accepted by the Lessee.

3. Lessor will also provide at its own cost and expense, all necessary tires and tubes, including necessary spare rims with tires mounted and ready for emergency service for each vehicle equipped with pneumatic tires.

4. Lessee shall deliver to the repair shop indicated by Lessor all vehicles needing repairs and such others as shall be requested by Lessor, for complete inspection and the necessary repairs.

Lessee also undertakes and agrees that Lessee's drivers will not make any repairs or adjustments to any of said vehicles (except substituting spare tires), that *that* in any and all cases of trouble, Lessee's drivers will notify the Lessor by the speediest means of communication, giving [fol. 13] a description of the nature of the trouble and the location of the vehicle.

Lessor undertakes and agrees to make regular inspection of each such vehicle.

Lessee undertakes and agrees that each of Lessee's drivers will at the close of each day, note on the "checking" report for the vehicle operated by him respectively any and all faulty operation or other trouble, if any, which he had with that vehicle.

5. Lessor will furnish Lessee with substitute vehicles to replace the vehicles returned by Lessee for repairs or service. Such substituted vehicles while in service of Lessee shall be subject to all of the terms and conditions of this agreement the same as if specifically described in this agreement, except that no lettering painting or other alterations will be made by Lessee on such substituted vehicles.

6. Lessee shall procure all fuel, oil and other lubricants required for the operation of said vehicles under this agreement, where reasonably possible, from suppliers designated by Lessor, but where that is not reasonably possible, Lessee shall procure and pay for the necessary fuel, oil and/or lubricants and deliver to Lessor a receipted bill therefor whereupon Lessor will reimburse Lessee for such purchases.

7. The Lessee agrees to pay, and shall pay, to Lessor on Wednesday of each week, the entire amount due as rental for the use of equipment furnished to the Lessee by Lessor during the preceding week, which amount shall be computed by both parties in accordance with the rates [fol. 14] set out in Schedule "B" which is annexed to this contract and made a part hereof by reference thereto.

The Mileage Charge shall be computed at the rate specified under the heading "Mileage Rate", in Schedule "B", and on the basis of the total number of miles such vehicle shall have operated each week.

8. The number of miles over which any particular vehicle shall have been operated for any given period of time, shall be determined by means of a standard mileage recording device attached to such vehicle. Provided, however, that in the event the mileage recording device of any vehicle leased under this agreement, shall, at any time while such vehicle is being operated by Lessee, fail to function thereby rendering unavailable a correct mileage record for such vehicle, the mileage for any day, days or fraction of a day, when the mileage recording device is thus out of order, shall be computed on the basis of Lessee's shipping records.

9. Lessor agrees to furnish to Lessee on or before Wednesday of each week during the life of this agreement, a complete record of the mileage readings for each vehicle leased under this agreement, on leaving and returning to the garage, including the number of miles run each day together with a check-up record showing the time drivers left and returned to garage during the week ending the preceding Saturday. Lessor shall cause this record to be filled in and signed by an employee in charge of its garage. Lessee agrees to cause Lessee's drivers to sign daily the mileage record, checking out and checking in the vehicle operated by them, respectively.

[fol. 15] 10. It is understood and agreed by and between the parties hereto that this Contract of Leasing shall be limited to the plant of the Lessee in Memphis, Tennessee.

Lessee agrees, as part of the consideration of this agreement that the Lessor shall have the exclusive right to furnish Lessee with tractor-tandem truck units and Lessee will not lease any tractor-tandem truck units from any other party for its use during the term of this agreement for the plant specified herein except that customers of Lessee may provide their own transportation by motor vehicle if they so desire; in the event the Lessor fails or is unable to supply sufficient equipment to meet the needs of lessee

then the Lessee, after notice to Lessor, may use other equipment furnished by other sources temporarily.

11. Lessor agrees at its own cost and expense to maintain in full force and effect insurance policies insuring the vehicles leased hereunder against the hazards of fire, theft, tornado, windstorm and earthquake damage.

12. Lessee agrees to provide and maintain in force a policy of public liability and property damage insurance for the account of whom it may concern with respect to liability for injuries to third persons and damage to or loss of property of third persons resulting from the operation of vehicles leased hereunder. Such public liability and property damage insurance policy shall have limits of not less than \$100,000.00 for injury to or death of one person and subject to that limit for each person to a total liability of \$300,000.00 for all persons injured or killed in the same accident and shall also have a limit of \$1000,000.00 for damage, destruction and/or loss of use of property of [fol. 16] third persons as a result of any one accident.

13. Lessee agrees that its drivers, servants and agents will cooperate fully with Lessor and the Insurance Carriers insuring the hazards enumerated in Paragraphs 11 and 12 in the investigation and defense of any and all claims or suits arising from the operation of the vehicles leased hereunder and will cause its drivers, servants and agents to make prompt report to Lessor of the occurrence of any and all accidents or collisions which occur while the vehicles leased hereunder are in the custody and control of Lessee or its drivers, agents, or servants, with the fullest information available regarding the time, place and nature of the accident or damage together with list of persons injured and owners of property damaged as well as a complete list of witnesses as it is possible to secure. Lessee agrees to promptly deliver to Lessor or such other person or company as Lessor shall have designated in writing; any and all papers, notices and documents whatsoever served upon or delivered to Lessee or Lessee's servants, agents or employees in connection with any claim, suit, action or proceedings at law or in equity commenced or threatened against Lessee and/or Lessor arising out of Lessee's operation of any of the vehicles leased hereunder.

14. All vehicles leased to Lessee under this agreement shall be operated only by safe, careful and licensed drivers to be selected, employed, controlled and paid by Lessee, said drivers being conclusively presumed to be the agent of Lessee only and Lessee shall require said drivers to operate such vehicles with reasonable care and diligence [fol. 17] and to use every reasonable precaution to prevent loss or damage to any of said vehicles because of fire, theft, collision or injury to third persons or property of third persons and upon written complaint from Lessor specifying any reckless, careless or abusive handling of any vehicle leased hereunder, Lessee shall remove such driver or drivers and substitute therefor, careful and safe drivers as soon as it is reasonably possible so to do.

15. Lessee agrees that none of the vehicles leased hereunder will, while in the possession, custody or control of Lessee, be loaded beyond their respective rating service capacity as specified in Schedule "A". In the event any of the said vehicles be overloaded to the extent of twenty (20) per cent or more of their respective rated capacity as specified in Schedule "A", such overloading shall be at Lessee's risk and expense, and Lessee agrees that in the event any of said vehicles be damaged in any manner by reason of such overloading Lessee shall immediately pay Lessor the amount of any and all such damage.

Lessee agrees not to permit any of the vehicles leased hereunder to be used in violation of any Federal, State or Municipal Statutes, Laws or Ordinance, Rule or Regulation applicable to the operation of such motor vehicles and will hold Lessor harmless from any and/or all fines, forfeitures, or penalties for traffic violation or for the violation of any statute, Law, Ordinance, Rule or Regulation of any duly constituted public authority.

16. Lessee agrees that upon the expiration of the period for which any vehicles delivered under this agreement respectively shall have been leased or upon the cancellation [fol. 18] or termination of this agreement, all of the vehicles delivered under this agreement to Lessee will be returned to the Lessor at the garage at which such delivery shall have been made (or such other garage in the same city as may have been designated by Lessor), in as good

mechanical condition and running order as they were when received by Lessee, ordinary wear and tear expected.

17. Lessor shall incur no liability to Lessee for failure to supply any vehicle; repair any disabled vehicle or supply any vehicle in exchange for another as this agreement provides, if such failure shall have resulted from fire, riot, strike or other labor troubles or Acts of God, or any other cause or causes beyond control of Lessor but in such event and during the period of such failure only the rental charges specified in this agreement shall abate.

18. This contract shall continue for a period of three (3) years from November 1, 1949; and the Lessee shall have the option to renew said contract for an additional period of three (3) years, provided notice of its intention so to do is served upon the Lessor at least thirty (30) days prior to the expiration of this contract.

19. This agreement has been executed in duplicate, each of which shall be deemed to be an original.

In witness whereof Lessee has hereunto set his hand and seal, or caused these presents to be duly executed by its President or Vice President and its corporate seal to be affixed hereto and attested by its Secretary or Assistant Secretary, and Lessor has caused these presents to be [fol. 19] executed by its President or Vice President and its corporate seal to be affixed hereto and attested by its Secretary or Assistant Secretary, this 30th day of September, 1949.

Frank E. Whittington Co., By Frank E. Whittington,
Its President.

Attest:

—, Its Secretary.

Lloyd A. Fry Roofing Company, a corporation, By
Lloyd A. Fry, Its President.

Attest:

Lloyd A. Fry, Jr., Its Secretary. (Seal.)

[fol. 20]

SCHEDULE "A"

Type	Name	Serial Number	Capacity
GCGT-5530	Fruehauf-Carter	ME8386	
"	"	ME8387	
"	"	ME8388	
"	"	ME8389	
"	"	ME8390	
"	"	ME8391	
"	"	ME8392	
FC-530	"	ME8393	
"	"	ME8394	
"	"	ME8395	
"	"	ME8396	
"	"	ME8397	
"	"	ME8398	
"	"	ME8399	
Tractor	GMC	14224	3 Tons
"	"	14223	" "
"	"	4039	" "
"	"	263	" "
"	"	402	" "
"	Dodge	8179-C394	" "
"	International	3042	" "
"	"	2185	" "
"	Mack	EHT-1D5758	" "
"	Ford	98EQH684	" "

[fols. 21-22]

Schedule "B"

The Lessee shall pay to the Lessor as rent, for the use of equipment described in Schedule "A", the sum of fifteen and one-half (15½) cents per mile, to be computed on Saturday of each week from the speedometer readings of each tractor unit used by the Lessee.

[fol. 23]

IN THE PULASKI CHANCERY COURT

[Title omitted]

RESTRAINING ORDER—May 10, 1950

On this date is presented to the Court verified complaint herein, seeking a temporary restraining order, and

The Court, being well and sufficiently advised, doth find that said restraining order should issue upon filing herein by the plaintiff of a good and sufficient bond in the sum of One Thousand Dollars (\$1,000.00), to be approved by the Clerk of this Court.

It is, therefore, by the Court ordered that the defendants herein, and each of them, their servants, agents, employees, attorneys and enforcement officers, be and they are hereby restrained and enjoined, pending the further orders of this Court, from molesting, interfering with, or hindering in any manner or particular whatsoever the plaintiff, or any of its agents, servants, employees, and drivers in the transportation of plaintiff's property by motor vehicle in the State of Arkansas, which property is being transported in equipment leased to, and operated by, plaintiff and its drivers, as described in the lease agreement marked Exhibit "A" and made a part of this complaint, and

[fol. 24] It is further ordered that the defendants, and each of them, individually and collectively, be, and they are hereby restrained from instituting, prosecuting, or maintaining; or aiding in the institution, prosecution, and maintenance of any criminal action against the plaintiff, or its representatives or employees, arising out of the operation of the leased motor vehicle equipment herein described, and while being operated in the transportation of property owned by the plaintiff, pending the further orders of this Court in this matter.

Dated at Little Rock, Arkansas, this 10th day of May, 1950.

/s/ Frank H. Dodge, Chancellor, Pulaski Chancery Court.

[fol. 25] IN THE PULASKI CHANCERY COURT

[Title omitted]

RESTRAINING ORDER BOND—May 10, 1950

We undertake that the plaintiff, Lloyd A. Fry Roofing Company, shall pay to the defendants, the damages which they or either of them, may sustain by reason of the restraining order in this action, not exceeding, however, the sum of One Thousand & No/100 Dollars, (\$1,000.00), if it

is finally decided that said restraining order ought not to have been granted.

Lloyd A. Fry Roofing Company, Principal, by Louis Tarlowski, Its Attorney, Travelers Insurance Company, Surety, by Ruth F. McCall, Attorney-in-Fact.

Attest:

_____, Clerk.

STATE OF ARKANSAS,

County of Pulaski, ss:

On this 10 day of May, 1950, before me personally came Ruth F. McCall, to me known, who being by me duly sworn, did depose and say: that she Attorney-in-Fact of The Travelers Indemnity Company, the Corporation described in and which executed the foregoing instrument; that she know(s) the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority granted to her in accordance with the By-Laws of the said Corporation, and that she signed her name thereto by like authority.

Wilma S. Reed, Notary Public. My commission expires 3-6-54.

[fol. 25a] THE TRAVELERS INDEMNITY COMPANY

Hartford, Connecticut

Power of Attorney

Know All Men by These Presents:

That The Travelers Indemnity Company, a corporation of the State of Connecticut, does hereby make, constitute and appoint Ruth F. McCall and Imogene Waller, both of Little Rock, Arkansas, each its true and lawful Attorney(s)-in-Fact, with full power and authority, for and on behalf of the Company as surety, to execute and deliver and affix the seal of the Company thereto, if a seal is required, bonds, undertakings, recognizances or other written obligations in the nature thereof, as follows: Any and

all bonds, undertakings, recognizances or other written obligations in the nature thereof and to bind The Travelers Indemnity Company thereby, and all of the acts of said Attorney(s)-in-Fact, pursuant to these presents, are hereby ratified and confirmed.

This appointment is made under and by authority of the following by-laws of the Company which by-laws are now in full force and effect:

Article IV, Section 9. The Chairman of the Board, the President, any Vice President, any Secretary or any Department Secretary may appoint attorneys-in-fact or agents with power and authority, as defined or limited in their respective powers of attorney, for and on behalf of the Company to execute and deliver, and affix the seal of the Company thereto, bonds, undertakings, recognizances or other written obligations in the nature thereof and any of said officers may remove any such attorney-in-fact or agent and revoke the power and authority given to him.

Article IV, Section 11. Any bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when signed by the Chairman of the Board, the President or any Vice President and duly attested and sealed, if a seal is required, by any Secretary or any Department Secretary or any Assistant Secretary, or when signed by the Chairman of the Board, the President or any Vice President and countersigned and sealed, if a seal is required, by a duly authorized attorney-in-fact or agent; and any such bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when duly executed and sealed, if a seal is required, by one or more attorneys-in-fact or agents pursuant to and within the limits of the authority granted by his or their power or powers of attorney.

In witness whereof, The Travelers Indemnity Company has caused these presents to be signed by its proper officer

and its corporate seal to be hereunto affixed this 3rd day of October, 1949.

The Travelers Indemnity Company, By J. C. Smith,
Secretary. (Seal.)

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 3rd day of October in the year 1949 before me personally came J. C. Smith, to me known, who, being by me duly sworn, did depose and say: that he resides in the State of Connecticut; that he is Secretary of The Travelers Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation, and that he signed his name thereto by like authority.

Margaret D. Tuttle, Notary Public. My commission expires April 1, 1954. (Seal.)

STATE OF CONNECTICUT,
County of Hartford, ss:

I, R. W. Kammann, Assistant Secretary of The Travelers Indemnity Company, a corporation of the State of Connecticut, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said Company, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of Hartford, this — day of — 19—.

R. W. Kammann, Assistant Secretary.

[fol. 26] [File endorsement omitted.]

[fol. 27] IN THE PULASKI CHANCERY COURT

[Title omitted]

MOTION—Filed May 31, 1950

Come the defendants and respectfully move this Honorable Court to dissolve its Restraining Order issued on May 10, 1950, and for cause therefor state:

The said Restraining Order gives to plaintiff and other persons associated with it an unsupervised immunity to ignore the laws of the State of Arkansas pertaining to motor carriers and transportation and the regulations of the Arkansas Public Service Commission in pursuance thereof. The enforcement officials of the Arkansas Public Service Commission are now helpless to require a compliance with safety regulations and other regulations for the protection of the people of the State of Arkansas.

Wherefore, premises considered, defendants pray that this Honorable Court immediately dissolve the said Restraining Order pending final hearing upon the merits of the cause.

Bailey and Warren, By Eugene R. Warren, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 28] IN THE PULASKI CHANCERY COURT

[Title omitted]

ORDER DISSOLVING RESTRAINING ORDER—June 5, 1950

In this cause it having been stipulated and agreed in open court by the defendants, acting by and through their authorized attorneys, that pending determination of the issues herein by the Chancery Court of Pulaski County, that neither the defendants nor their attorneys, agents, servants, representatives or employees would arrest, prosecute, molest or interfere with plaintiff, its agents, ser-

vants or employees in the conduct of plaintiff's business in the State of Arkansas as set forth in the complaint herein, either directly or indirectly, upon the ground or grounds (1) that plaintiff is not a bona fide private carrier; (2) that plaintiff, its agents, employees or lessors of motor vehicle equipment leased by plaintiff are contract carriers, or (3) that the leasing agreement referred to in the complaint is invalid or unlawful, now, therefore, by agreement of the parties it is

Ordered, adjudged and decreed by the Court that the restraining order heretofore issued herein be and the same is hereby dissolved, and the surety upon plaintiff's restraining order bond released and discharged.

[fol. 29] Enter this June 5, 1950.

/s/ Frank H. Dodge, Chancellor.

Approved for Entry

Louis Tarlowski, Glenn M. Elliott, Attorneys for Complainant.

Eugene R. Warren, Attorneys for Defendants.

[fol. 30] IN THE PULASKI CHANCERY COURT

[Title omitted]

ANSWER—Filed September 6, 1950

Comes the Arkansas Public Service Commission and files herewith its answer to the complaint of the plaintiff and states:

I

Defendant admits the allegations in Paragraphs One (1), Two (2), Three (3), and Four (4) of the complaint.

II

Defendant denies the allegations in Paragraphs Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), and Twelve (12) of the complaint.

III

Defendant states that the complainant has a plain and adequate remedy at law and that its attempts herein are to shackle the enforcement of the Statutes of the State of Arkansas by its duly appointed and acting enforcement officials. That plaintiffs are attempting by subterfuge to evade the laws of the State of Arkansas and to allow and assist others to operate as either common or contract carriers of property in the State of Arkansas without proper authority or certificate as required by law.

Wherefore, defendant prays that the complaint of the [fol. 31] plaintiff be dismissed; that the temporary restraining order be set aside for all other proper relief.

Arkansas Public Service Commission, By Eugene R. Warren, Special Counsel.

[File endorsement omitted.]

[fols. 32-33] IN THE PULASKI CHANCERY COURT

[Title omitted]

DEPOSITION—Filed September 26, 1950

The deposition of Frank E. Whittington, a witness for the defendants, taken upon behalf of the defendants, between the hours of 8:00 o'clock A. M. and 6:00 o'clock P. M., on the 13th day of September, 1950, at the office of Glenn M. Elliott, attorney at law, in the City of Memphis, State of Tennessee, to be read as evidence in the action between the plaintiff and defendants, pending in the Pulaski Chancery Court of the State of Arkansas.

[fol. 34]

STIPULATIONS

It is hereby stipulated and agreed by and between the parties hereto, by counsel, that this deposition of the witness may be taken in shorthand by W. Charles Webster,

acting official court reporter for the Pulaski Chancery Court, First Division, State of Arkansas, and by him later transcribed on the typewriter.

It is further stipulated and agreed by and between the parties hereto, by counsel, that this deposition is taken by agreement heretofore made, notice as to time and place being expressly waived.

It is further stipulated and agreed by and between the parties hereto, by counsel, that the right is reserved to object to the admissibility of any of the testimony on the grounds of materiality, relevancy or competency.

It is further stipulated and agreed by and between the parties hereto, by counsel, that the signature of the witness to his deposition is hereby waived, and that the certificate and signature of L. L. Coleson, Notary Public in and for the State of Tennessee, before whom said witness was sworn, will be and is hereby waived by counsel for the parties.

[fol. 35] MR. FRANK E. WHITINGTON, a witness called on behalf of the defendants, having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Direct examination.

Mr. Bailey:

Q. State your name, please, sir.

A. Frank E. Whittington.

Q. Where do you live, Mr. Whittington?

A. 385 Palmer Road, White Haven, Tennessee.

Q. How long have you lived there?

A. About three months.

Q. Is this White Haven, Tennessee, is that a suburb of Memphis?

A. Memphis, yes, sir.

Q. What is your occupation?

A. I have a truck leasing and maintenance business.

Q. Do you own the Frank E. Whittington Company?

A. I own Frank E. Whittington, Inc., and I do lease some trucks as Frank E. Whittington as an individual.

Q. Is this a corporation?

A. The Fry Roofing deal is a corporation.

Q. You say it is a corporation?

A. The tractors and trailers loaned to the Fry Roofing Company are owned by the corporation.

Q. And leased to the corporation?

A. Leased by the corporation.

Q. You have a place of business in Memphis?
[fol. 36] A. 259 Webster Street.

Q. Now, Mr. Whittington, this Frank E. Whittington Company, is that the company—that is the company that leases the trucks and tractors and trailers to the Fry Roofing Company?

A. Frank Whittington, Inc., is the company that leases the trucks and trailers to the Fry Roofing Company.

Q. Are you the majority stockholder in this company?

A. Yes, sir.

Q. Do you furnish tractors and trailer units to industrial concerns under a lease agreement?

A. Several.

Q. Do you lease tractors and trailer units to the Fry Roofing Company?

A. I do.

Q. Mr. Whittington, how many tractors and trailer units do you furnish to the Fry Roofing Company under this lease?

A. 12 tractors and 18 trailers.

Q. Do you have the motor numbers and serial numbers and descriptions of these various tractors and trailers?

A. Yes, sir.

Q. Do you have these descriptions with you?

A. No, sir. I can get them. I have them at my office.

Mr. Elliott: I believe on the first day of the trial before the Court, Mr. Hecht, who testified on behalf of the Lloyd A. Fry Roofing Company, agreed to file a list as an exhibit to his testimony, and we'll comply with that agreement.

[fol. 37] Mr. Bailey (Continuing):

Q. I would like to ask at this time—make the request that you furnish, if you would, furnish us a list of tractors

and trailers, with the motor numbers, serial numbers and license numbers, you lease to the Fry Roofing Company.

A. Yes, sir.

Q. You can furnish that in the form of a letter to us. That will be all right.

A. It is no trouble to me. I have it on my records, my insurance records and everything else. I don't have it with me, but I can certainly get it in short order.

Q. We would appreciate it if you would furnish that.

Mr. Elliott: May I inquire of counsel whether he wants both Mr. Hecht and Mr. Whittington to furnish the list. It will be an identical list. We have no objections to both furnishing it, but if we can have it submitted by one, it will shorten the record.

Mr. Bailey: Since I didn't ask for the other list, I'll have to presume that we'll have to have both.

Mr. Elliott: All right, you will be furnished with two lists.

Mr. Bailey (Continuing):

Q. Mr. Whittington, these tractors and trailer units that you lease to the Fry Roofing Company, do you own all of these tractors and trailer units?

A. I own all of the trailer units. I now own seven of the tractor units. I have five leased that I in turn lease to the Fry Roofing Company.

[fol. 38] Q. You say you own all of the trailers?

A. Yes, sir, all of them and seven tractors.

Q. Who owns—then there are five tractors that you do not own?

A. Yes, sir.

Q. Who owns the five tractors that you do not own?

A. A man by the name of Oliver Batson; J. A. Mayo owns one; A. D. Hollingsworth; a man by the name of Lindsey owns one. That is five. I think that is the five.

Q. Mr. Whittington, on that previous list that I asked you to submit to us, of the tractors and trailer units, also I would like to ask you if you would list alongside those descriptions which of those trailers you own and the man's name down on the ones you do not own.

A. I will do that, sir, yes, sir.

Q. Mr. Whittington, those five men you just now named as owning tractors, how many of them are employed by the Fry Roofing Company?

A. All five of them.

Q. Are you paid on a flat mileage basis by the Fry Roofing Company for the use of these tractors and trailer units?

A. For the use of the tractors and trailers as a unit, yes.

Q. How much do you pay on a mileage basis?

A. How much do I pay?

Q. No, how much are you paid by the Fry Roofing Company?

A. I don't think I'll answer that.

Mr. Elliott: Tell him, if you know. The record establishes, as reflected by the leasing agreement between [fol. 39] Whittington and Fry Roofing Company, as reflected by Schedule "B" to the lease, that he is paid $15\frac{1}{2}\epsilon$ a mile. If that is not correct, I think you should advise counsel, Mr. Whittington.

A. (Witness answering) That is correct.

Mr. Bailey (Continuing):

Q. That is $15\frac{1}{2}\epsilon$?

A. $15\frac{1}{2}\epsilon$ for the entire unit, that is.

Q. That is what you are paid by the Fry Roofing Company?

A. That is right.

Q. What basis do you use to pay the owners?

A. Mileage basis.

Q. You pay them on a mileage basis? How much do you pay?

A. 9¢ a mile.

Q. Mr. Whittington, do you have some sort of agreement with the owners of the tractors that you are leasing?

A. You mean a lease agreement?

Q. Yes, sir.

A. Yes, sir. I have an agreement with each one of them.

Q. Would you mind glancing over that agreement (counsel hands witness an instrument)?

A. This is a copy of the lease that we first used, and we substituted a later lease for it.

Q. Was this lease—is that a copy of the form of lease you entered into with the owners of these?

A. I would have to compare it to one, but it looks like a copy of the original lease that we signed with these tractor owners.

Q. Well, now, you state original lease. Do you think that is a copy of the form that was used at the time this suit [fol. 40] was filed?

A. No—let me ask you when the suit was filed.

Q. May 11.

A. No.

Q. Mr. Whittington, is that the form that you were using at the time the Arkansas Public Service Commission first started investigating your operations, in the early part of 1950—early part of January, 1950?

A. In the early part of 1950, yes, sir.

Mr. Bailey: Mr. Elliott, I would like to introduce that as defendant's exhibit.

Mr. Elliott: In response to that, let me ask the witness a preliminary question.

Mr. Bailey: Yes, sir.

Mr. Elliott: Mr. Whittington, this document which he has handed you appears to be a document on legal size paper five pages long. Have you read it?

A. No, I haven't read it.

Mr. Elliott: Do I understand your testimony to be it looked like a copy of a form of a lease that was used in the early days of the operations?

A. That is right.

Mr. Elliott: Counsel, we have no objections to you filing it as defendant's exhibit, subject to the right of the witness to read it and ascertain whether it is in fact a true copy—

Mr. Bailey (Interrupting): Surely.

[fol. 41] Mr. Elliott: —of whatever he has testified to.

Thereupon, said document was introduced and received into evidence and marked Exhibit 1 hereto.

[fol 42]

EXHIBIT 1 TO DEPOSITION

Agreement

This agreement made and entered into this _____ day of _____, 1949, by and between _____, hereinafter referred to as Party of the First Part, and _____ hereinafter referred to as Party of the Second Part,

Witnesseth

Whereas, the Party of the First Part is engaged in the business of leasing truck tractor and trailer units to large industrial concerns. Said industrial concerns haul their own products and furnish their own driver and their own public liability insurance and property damage insurance. Such public liability and property damage insurance policy shall have limits of not less than \$100,000.00 for injury to or death of one person and subject to that limit for each person to a total liability of \$300,000.00 for all persons injured or killed in the same accident and shall also have a limit of \$100,000.00 for damage, destruction and/or loss of use of property of third persons as a result of any one accident. The Party of the First Part furnishes the trailer and rents the truck-tractor from a driver-owner who is able to obtain and retain employment as driver of his own tractor with the concern that leases these units. The Party of the First Part is responsible for the leasing of the entire units, also supervises the maintenance, and

Whereas, the Party of the Second Part, driver-owner, is the owner of a lawfully licensed truck tractor or holds sufficient equity therein to lawfully lease same tractor to [fol 43] the Party of the First Part. Said driver-owner must have sufficient experience in the operation of truck-tractor and trailer units to, through his own effort and initiative, be able to obtain and retain (during the life of this agreement) the status of truck-tractor driver on the tractor he leases the Party of the First Part with the concern the Party of the First Part leases his tractor to. It is understood that the Party of the First Part will in no way have anything to do with the selections, directions or control of drivers.

It is therefore mutually agreed as follows:

The Party of the First Part agrees to lease and does lease from the Party of the Second Part one truck-tractor herein described:

Make	Year	Motor No.
Model	Serial No.	State and License No.
Weight Complete		

It is further understood by and between the Parties hereto that the minimum specifications of the above truck-tractor are adequate properly to perform and to handle any load assigned to it for transportation. It is further understood that the Party of the Second Part must arrange with the industrial concern, Party of the First Part leases to, drive his own tractor, or this entered agreement is cancelled immediately. The Party of the First Part further agrees to furnish truck tractor fully equipped to pull trailer of the Party of the First Part, said tractor controls must be able to operate by both air or vacuum brakes on trailer extra equipment must include fifth wheel, extra gas tank and all necessary safety equipment.

[fol. 44] The Party of the First Part agrees to lease the above truck tractor equipment to responsible concerns under long term lease and this tractor will become part of unit under lease agreement.

The Party of the First Part agrees to pay as rental for truck tractor at the sum of _____ per mile as recorded on speedometer, and will pay on Thursday of each week the entire amount due on truck tractor rental for the preceding week.

The Party of the Second Part agrees for and in consideration of terms herein set forth that the possession, use and control of the aforementioned truck-tractor as above described licensed and registered is hereby vested entirely and exclusively in any concern Party of the First Part chooses to lease to,

The Party of the Second Part agrees to permit said truck-tractor to be operated at all times in accordance with the provisions of any applicable oral or written agreement between the Party of the First Part and the concern leasing the equipment.

The Party of the Second Part agrees to properly maintain said truck tractor in good and efficient working order at all times subject to the approval of the Part of the First Part and to pay his sole cost and expenses for all gasoline, tires, replacement parts, repairs of any kind and expenses arising out of the ownership of the said truck-tractor including all necessary license road mileage tax and registration fees; and upon failure to do any of these things the Party of the First Part may, but is not required so to do, pay license road mileage tax, register or maintain said tract-tractor in good efficient working order and may charge the cost thereof including a proper allowance for [fol. 45] administrative overhead cost to the Party of the Second Part who hereby agrees to promptly reimburse the Party of the First Part for all such cost on demand. The Party of the Second Part will not charge purchases of any nature whatsoever to the account of the Party of the First Part or any concern Party of the First Part leases to and that the Party of the Second Part has not the authority or permission to make such charges.

The Party of the Second Part agrees to paint said truck tractor or cause it to be painted and properly maintained at his own expenses in the color and manner with the insignia, figures, symbols or names as may be designated by the Party of the First Part; also to keep truck tractor washed, cleaned or polished.

The Party of the Second Part agrees to obtain and have in effect at all times proper and sufficient, fire, theft and collision insurance to cover said truck tractor and its accessories, and in the event Party of the Second Part fails or for any reason does not have such coverage in effect, the Party of the First Part shall not be liable to Party of the Second Part or any of his creditors.

The Party of the Second Part agrees to provide, keep and maintain on said truck-tractor at all times proper safety equipment as described by the rules and regulations of the Interstate Commerce Commission or any other regulatory body.

The Party of the Second Part agrees to pay to the Party of the First Part for any damage to their trailers caused by truck-tractors defective brakes or steering mechanism

or any defect of tractor not directly chargeable to the driver of the tractor. If the Party of the First Part is [fol. 46] unable to use said truck tractor because of lock-outs, strikes or any cause or conditions beyond the control of the Party of the First Part, no liability, compensation or amounts due of any kind shall accrue to the benefit of credit of the Party of the Second Part during such time or period.

It is mutually agreed by both parties insofar as the operation of the said truck-trailer are applicable that all of the provisions, conditions and covenants of this agreement shall be governed by and subject to the provisions and conditions and covenants contained in any agreement entered in between the Party of the First Part and concern leasing this equipment; and agreements now in force and effect may hereafter be amended or renewed by a like agreement, the terms and conditions will be known to the Party of the Second Part.

In the event that the Party of the Second Part refuses, or, through no fault of Party of the First Part, is unable to completely perform and carry out his part of the agreement, the Party of the First Part may declare this agreement cancelled forthwith as hereinafter provided, and that the Party of the First Part is hereby authorized to withhold all monies due the Party of the Second Part for the rental of truck-tractor under this agreement for a period of sixty days from date of cancellation to be applied against any and all debts, accounts, contracts, damages, causes of action, judgments, claims and damages whatsoever arising from such refusal or failure on the part of the Party of the Second Part to fulfill any and all of the terms of this agreement.

It is further mutually agreed that this agreement shall [fol. 47] become effective upon the signing and execution hereof and shall remain in full force and effect for three years starting November 1, 1949 with Party of the First Part fifteen days prior to the expiration. However, if the Party of the Second Part fails or neglects to perform in accordance with any and all terms and conditions of this agreement, then in that event the Party of the First Part may immediately terminate this agreement upon written

notice to Party of the Second Part with such reason stated therein, otherwise this agreement shall remain in full force and effect except as otherwise provided herein until voluntarily cancelled by either of the parties herein by giving the other a five day written notice of the desire to cancel.

This agreement has been executed in duplicate each of which shall be deemed to be an original.

In Witness Whereof, the parties hereto have set their hands and seals on the day and year first above written.

[fol. 48] Mr. Bailey (Continuing):

Q. Mr. Whittington, do you have a copy of the agreements that you now have with the five men from whom you are now leasing tractors for the Fry Roofing Company operations?

A. Yes, sir.

Q. Mr. Whittington, this form of lease that was handed to me by Mr. Elliott, how long has this lease been in effect?

A. I believe it was the early part of March or April, around March or April.

Q. You are not certain of the exact date?

A. No, sir, I am not sure of the exact date.

Q. Is this the same copy of the lease that you filed with the ICC?

Mr. Elliott: I object to that. There is no evidence in the record that any lease has been filed by the Whittington corporation with the ICC. That is of record.

Mr. Bailey: I'll withdraw that question.

Mr. Bailey (Continuing):

Q. Did you file a copy of the lease with the ICC?

A. No.

Q. Mr. Whittington, will you furnish us with a photostat of the copy of your lease with these five men from whom you are leasing trucks?

A. Sure will.

Mr. Elliott: At whose expense?

Mr. Bailey: We will pay for it.

[fol. 49] Mr. Bailey (Continuing):

Q. Mr. Whittington, are you leasing any trucks from individuals, which are in turn leased to the Fry Roofing Company, where the individual is not employed by the Fry Roofing Company as a driver?

A. No.

Q. Do you send these drivers to the Fry Roofing Company, or does the Fry Roofing Company send them to you?

Mr. Elliott: I object to that, because there has been no evidence of either sending a driver to the other.

Mr. Bailey: You have got the right to object, according to the stipulation we have.

Mr. Elliott: I am exercising my right to object.

Mr. Bailey (Continuing):

Q. What was your answer to that question, Mr. Whittington?

A. What is the question again?

Q. Do you send these drivers to the Fry Roofing Company, or does the Fry Roofing Company send them to you?

A. The Fry Roofing Company sends them to me.

Q. Do you have any sort of permit to act as a broker or as a carrier in the State of Arkansas?

A. I am not a broker or a carrier.

Q. Do you have a permit?

A. I do not have.

Q. Do you have a permit with the ICC?

A. No.

Q. Mr. Whittington, these five men from whom you lease tractors and who are employed by the Fry Roofing Company, [fol. 50] do they drive their own tractors?

A. I would say most of the time. It so happens one of them is driving my truck now.

Mr. Bailey: That is all.

Cross-examination.

Mr. Elliott:

Q. These five men that you say you are leasing equipment from, that you sublease to Fry Roofing Company,

were the leases with all of these men all executed at the same time or at different times?

A. Different times. Some of those men haven't been out there more than three or four months—three months.

Q. Now, to try to follow somewhat the pattern at this point of the State's questions, you were asked if you received a consideration of 15½¢ a mile, and your answer was "yes".

A. Right. Yes.

Q. Is that for the combination tractor and trailer?

A. That is right.

Q. And that is the consideration you receive for performing all of the obligations resting upon you by virtue of your lease with Fry Roofing Company?

A. That is right.

[fol. 51] Q. Money which you pay in rental—9¢ a mile is for a tractor only?

A. Right.

Q. And is for those things that are set forth in the form of lease which you say you are operating under?

A. That is right.

Q. In renting equipment from owners?

A. Yes, sir.

Q. The State has asked you about the form of lease, but has not asked you to file a copy. Will you file a copy of such lease, form of lease, as Exhibit #2 to your deposition?

A. I will.

Thereupon, said document was introduced and received into evidence and marked Exhibit #2 hereto.

[fol. 52]

EXHIBIT 2 TO DEPOSITION

Equipment Lease

This Agreement made and entered into this _____ day of _____, 1950, by and between _____, a resident of the City of _____, State of _____, hereinafter referred to as Lessor, and _____, of the City of _____, State of _____, hereinafter referred to as Lessee.

Witnesseth, that

Whereas, the Lessor is the owner of one _____ tractor, having Motor No. _____, and desires to lease the use thereof to Lessee and,

Whereas, the Lessee is engaged in the business of furnishing motor vehicle equipment to large industrial concerns, for use by such firms in the transportation of their own property and,

Whereas, the Lessee is desirous of acquiring the use of the Lessor's tractor, to be used by Lessee in Lessee's business of furnishing equipment.

Now, Therefore, This Agreement Is Intered Into:

I

Each of the Parties acknowledge the receipt and sufficiency of a valuable consideration from the other.

II

The Lessor hereby leases, lets and rents unto the Lessee, and the Lessee leases from the Lessor, one (1) truck-tractor of _____ make, Motor No. _____, for the term and consideration and subject to the conditions hereinafter stated.

[fol. 53] It being understood and agreed by the Parties hereto that Lessee will use the leased tractor in Lessee's business of furnishing motor vehicle equipment to industrial concerns and the right is here specifically granted to Lessee to sub-let the leased tractor to any person of Lessee's choosing.

III

The Lessor agrees to equip and maintain the leased tractor so that it may be operated with both air or vacuum brakes and to equip said tractor with fifth wheel, extra gas tank and all required safety equipment.

The Lessor agrees to properly maintain the said truck-tractor in good and efficient working order and to pay all costs of operation of said tractor, including, but not limited to, all gasoline, oil, tires, replacement parts and repairs of any kind and, including all necessary license, road mileage tax and registration fees. It being further understood that in the event Lessor fails to so maintain and keep the leased tractor, that the Lessee shall have the right to furnish gasoline, oil, tires, and to make repairs and deduct for such costs from the rental hereinafter provided to be paid.

IV

In consideration of the lease of the aforescribed truck-tractor and, in consideration of the several covenants contained in this agreement, the Lessee agrees to pay to the Lessor, as rental, the sum of _____ per mile, for all miles operated, as recorded on the speedometer and to make payments on rental on Thursday of each week, while this lease agreement is in effect.

[fol. 54]

V

The Lessor agrees to paint, or cause to be painted, the leased truck-tractor in the color and manner and with the insignia, figures, symbols or names which may be designated by the Lessee, said painting to be done at Lessor's expense. Lessor further agrees to keep the truck-tractor washed, cleaned and polished during the term of this agreement.

VI

The Lessor agrees to obtain, and have in effect at all times, proper and sufficient fire, theft and collision insurance on the leased truck-tractor. In the event the Lessor failed to effect such insurance, and to maintain such insurance, then, in that event, the Lessee shall not be liable

to Lessor for the damage, loss, or destruction of the leased tractor.

VII

The Lessor agrees to provide, keep and maintain, on the leased tractor, all safety equipment required by the Interstate Commerce Commission, or other regulatory body.

VIII-

The Lessor agrees that it will not make or charge purchases in the name of Lessee, or in the name of the concern to whom Lessee may sub-let the leased tractor.

IX

It is understood and agreed that Lessee and the concern to whom Lessee may sub-let the leased tractor, shall have the full, exclusive, and complete use of the leased vehicle during the term of the lease.

[fol. 55]

X

The term of this agreement shall be for a period of three (3) years, but, it is understood and agreed, that either party may cancel this agreement, at will, on thirty (30) days written notice to the other party. It is further understood that Lessee makes no representation, or guarantee; as to the number of miles the leased tractor will be operated for any given period.

Witness the hands of the Parties this the day and date first above written.

_____, _____, _____, _____, _____

[fol. 56]

EXHIBIT 3 TO DEPOSITION

Schedule A

Trailers

Type	Name	Serial No.	Owner
FCGT-5530	Fruehauf-Carter	ME 8386	Frank Whittington, Inc.
"	"	" 8387	"
"	"	" 8388	"
"	"	" 8389	"
"	"	" 8390	"
"	"	" 8391	"
"	"	" 8392	"
FC-530	"	" 8393	"
"	"	" 8394	"
"	"	" 8395	"
"	"	" 8396	"
"	"	" 8397	"
"	"	" 8398	"
"	"	" 8399	"
AA-66	Trailmobile	41-901-01105	"
"	(Semi-Trailer)	"	"
"	"	41-901-01106	"
"	"	41-901-01107	"
"	"	41-901-01108	"

Tractors

Make	Model	Motor No.	
White	WB 26	150A2349	A. D. Hollingsworth
Reo	E 22	331A68392	W. R. Lindsey
Mack	EHT	EN354-274-85	Dick G. Allen
GMC	HCA-471	A270766737	Oliver Batson
Ford	F 8	98-EQH684	J. A. Mayo
I HC	KB8-1	RED401-18286	Frank Whittington, Inc.
"	"	RED401-14291	"
"	"	RED-401-9660	"
"	KB8	RED 361-20375	"
"	L-195	L-1952394	"
GMC	ACR620	A361684D	"
White	WB22	150A12021	"

[fol. 57] Q. You have also been asked to file a list of equipment which you are now leasing to the Fry Roofing Company. Does that list vary from time to time as equipment is added or withdrawn from service or substituted for other equipment?

A. It does.

Q. That is provided for in your lease with Fry?

A. That is right.

Q. The list which you will furnish will be the equipment which you are as of this time leasing to Fry?

A. Right.

Q. You also were asked whether or not you had a permit or certificate from the Interstate Commerce Commission, and your answer was you did not.

A. That is right.

Q. Let me ask you, Mr. Whittington, is it not a fact the Interstate Commerce Commission has instituted no complaint proceeding against you for conducting the operation you are conducting and have been conducting for months?

A. That is a fact.

Q. Do you know whether or not the local representative of the Interstate Commerce Commission, Mr. Goodwin, is fully advised of your operation?

A. I am sure he is.

Q. He is the man in charge of the Interstate Commerce affairs at Memphis?

A. He is.

Q. You were further asked whether these individuals from whom you lease equipment that you subsequently [fol. 58] lease to Fry Roofing Company, drive their own tractors, and your answer was you thought they did as a general matter.

A. As a general matter they do. It is not a set rule in any case.

Q. As a matter of fact, do you have any information with respect to who is going to drive any particular tractor on any particular trip, on any particular day or to any particular destination?

A. None whatsoever.

Q. Do you have anything whatsoever to do with the employment of truck drivers by the Fry Roofing Company who are going to drive the equipment you lease to Fry?

A. Not at all.

Q. Do you have any agreement directly or indirectly, written or oral, when you lease a piece of equipment from an individual, that he will be employed by Fry to drive that equipment?

A. That isn't my business at all.

Q. Well, do you?

A. No.

Q. Do you have anything whatsoever to do with setting the wages of the truck drivers employed by Fry Roofing Company?

A. No.

Q. Do you have anything whatsoever to do with setting the wages of the truck drivers employed by Fry Roofing Company?

A. No.

Q. Do you have anything whatsoever to do with setting the conditions of employment of truck drivers for Fry Roofing Company?

A. None at all.

Q. Can you direct, or do you direct, and control, directly or indirectly, or in any degree, the performance of the duties [fol. 59] of a truck driver by any driver for Lloyd A. Fry Roofing Company?

A. None at all.

Q. Can you, or do you, direct whether any driver will report for work or be given work by Fry?

A. No.

Q. Can you, or do you, direct to what destination the equipment you lease to Fry will be operated?

A. No.

Q. Can you, or do you, direct to what destination a driver will or does operate equipment leased to Fry?

A. No.

Q. Do you have any control whatsoever on the type, quantity or character of merchandise transported in equipment you lease to Fry?

A. None at all.

Q. Is the compensation which you receive from Fry or which you pay to owners of tractors that you lease based on the amount of merchandise transported or to be transported in that equipment?

A. No.

Q. Is it based whatsoever upon the destination to which the equipment may be operated?

A. No.

Q. Do you have or exercise, directly or indirectly, any control whatsoever over the strike that physically, if you will. Do you have anything whatsoever to do with the

loading of merchandise in equipment which you lease to Fry?

A. None at all.

[fol. 60] Q. Are the drivers of the equipment which you lease to Fry required to, or do they, report to you the hours worked?

A. No.

Q. Do they deliver their drivers' logs to you?

A. No.

Q. For redelivery to Fry?

A. No.

Q. Do you ever see the drivers' logs at all?

A. Never have.

Q. Do you have any responsibility whatsoever with respect to safety of the cargo transported in equipment which you have leased to Fry?

A. No.

Q. Are you furnished with any records with respect to type or quantity of cargo or where it is to be transported?

A. No.

Q. Do you have or exercise authority to increase or decrease drivers' wages?

A. No.

Q. Do you have or exercise authority to discharge a driver?

A. No.

Q. Do I understand that the drivers I am referring to in each instance are drivers of Fry Roofing Company?

A. Right.

Q. Operating equipment which you lease to Fry Roofing Company?

A. Right.

Q. Do you deduct social security taxes from the compensation paid by you for equipment leased?

[fol. 61] A. No.

Q. Do you carry workmen's compensation insurance on the drivers of equipment that you lease to Fry?

A. No.

Q. Are the drivers of the equipment which you lease to Fry carried on your payrolls as employees?

A. No.

Q. Do you, directly or indirectly, furnish or select the driver or drivers for the vehicles which you lease to Fry?

A. I do not.

Q. Are your leases trip leases or long term leases?

A. Long term—as a matter of fact, three years.

Q. During the course, or during the term, rather, of your lease of equipment to Fry, is it available to you for leasing to any other person or corporation?

A. No.

Q. Is it available to you for any use whatsoever during the term of the lease?

A. Not at all.

Q. I believe you said you assume no responsibility for the safe delivery of the cargo transported?

A. I did.

Q. You said that?

A. I said I assume no responsibility.

Q. Do you carry cargo insurance on the cargo transported in equipment which you lease to Fry?

A. I do not.

[fol. 62] Q. Do you carry public liability and property damage insurance on the equipment which you lease to Fry?

A. I do not.

Q. Is the charge which you make for leasing equipment to Fry based on a per pound rate?

A. No.

Q. Is the charge which you make to Fry a transportation charge or an equipment lease charge pure and simple?

A. It is an equipment lease charge.

Q. Do you issue receipts or bills of lading to the Fry Roofing Company for the contents of the cargo hauled in vehicles which you lease to Fry?

A. I do not.

Q. Do you arrange for the segregation of the drivers' wages and have the Fry Roofing Company pay it and credit the amount of such wages on the agreed total compensation to you from Fry Roofing Company?

A. No.

Q. I have asked you about the drivers' logs, have I not?

A. You have.

Q. Who exercises the entire control over the drivers of the equipment which you lease to Fry?

A. The employee of Fry Roofing Company.

Q. Who exercises the entire control over the use and operation of the equipment which you lease to Fry?

A. The same employee of Fry Roofing Company.

Q. I say, who exercises the control over the use of the [fol. 63] equipment which you lease to Fry?

A. Fry Roofing Company or their employees.

Q. And who direct the drivers of the equipment and the operation of the equipment?

A. The Fry Roofing Company.

Q. And so far as you know of, have all terms and provisions of your lease of equipment to Fry Roofing Company been complied with, both by you, and by the Fry Roofing Company?

A. As far as I know it has.

Q. Is it not a fact that you were willing personally to appear before the Court and give the testimony you have given here today, had you been able to get assurance from the officials of the State of Arkansas that such appearance would not be used as a subterfuge to arrest you for old charges?

Mr. Bailey: I'll object to that question.

A. (Witness answering) It is a fact.

Mr. Elliott (Continuing):

Q. As a matter of fact, didn't you go to Little Rock for exactly that purpose?

A. I certainly did.

Q. Did you not instruct your attorney to represent to the Court that you would be made available for testimony if such assurance could be had?

A. I did.

Q. As a matter of fact, didn't your attorney advise you that he had endeavored to obtain such assurance in open court and was unable to obtain such assurance?

[fol. 64] A. Yes, sir.

Q. And you have appeared here willingly, without subpoena, in order that the Court may be advised of the true facts in connection with this operation?

A. I have.

Q. And given your deposition voluntarily?

A. I have.

Mr. Elliott: That is all.

Re-direct examination.

By Mr. Bailey:

Q. Mr. Whittington, on the question as to whether or not you have been granted immunity to come over to Little Rock to testify, did your attorney tell you that he talked with anyone that had the power to grant you that power of immunity from arrest?

A. He didn't tell me that—he didn't mention names, no.

Q. Mr. Whittington, I believe you stated that you entered into three year leases. Is that three year lease between you and Fry Roofing Company?

A. Between me and the Fry Roofing Company and also between me and the drivers.

Q. You also entered into a three year lease with the drivers?

A. Yes, sir. They both are of a three year duration.

Q. Has your list of leased equipment—that is, the equipment [fol. 65] ment that you are now leasing and then subleasing to Fry Roofing Company—materially changed in the last six months?

A. It certainly has. The fact of the matter is, I believe three of the five are only six months old. I may be mistaken.

Q. Three of the five leases you now have from driver-owners are now about six months old?

A. Six months or older.

Q. Mr. Whittington, is there now any action pending by the ICC against you involving either the present lease that you entered into with these owners of tractors or prior lease you had with these tractor owners?

A. There isn't any action appearing with the ICC with any lease that I have, anywhere that I know of, not to my knowledge.

Mr. Bailey: That is all.

[fol. 66] Reporter's certificate (omitted in printing).

[File endorsement omitted]

[fol. 67] IN THE PULASKI CHANCERY COURT

[Title omitted]

Transcript of Proceedings

CAPTION

Testimony taken ore tenus before the Court on September 6, 1950, a day of the April Term, 1950; and October 11, 1950, a day of the October Term, 1950, the parties reserving the right to object to any testimony now offered upon appeal to the Supreme Court, without formal objection being made at this time.

APPEARANCES

For Plaintiff: Honorable James W. Wrape, Honorable Glenn M. Elliott, Honorable Louis Tarlowski.

For Defendants: Honorable Eugene R. Warren, Honorable R. Eugene Bailey.

[fol. 68] MR. LEON HECHT, a witness called on behalf of the plaintiff, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct examination.

By Mr. Elliott:

Q. You are M. Leon Hecht?

A. I am.

Q. Where do you live, Mr. Hecht?

A. 1186 Sledge Avenue, Memphis, Tennessee.

Q. By whom are you employed and in what capacity?

A. I'm employed by the Lloyd A. Fry Roofing Company in the capacity of manager of the Memphis operation.

Q. How long have you been with Fry?

A. December 26, 1943.

Q. How long have you been in charge of the Memphis operation?

A. I succeeded Mr. Berthell in February, 1944—the 21st.

Q. At Memphis, I wish you to describe what business Fry Roofing Company is in.

A. Fry Roofing Company manufactures asphalt roofings and coatings and you would know them as plastic cements and roof coatings. We also own—wholly own the Volney Felt Mills, Inc., in manufacturing roofing felts. We take the raw materials, the waste paper and rags and wood, and manufacture roofing felt and take it up to the other building and manufacture, or fabricate, rather, the asphalt roofings from those raw materials.

[fol. 69] Q. Then the roofing, as I understand it, is sold and distributed by Lloyd A. Fry Roofing Company?

A. That is correct.

Q. The operation of the Volney Felt Mill and the Fry Roofing is one and the same company carried on under the supervision of the same personnel?

A. That is correct.

Q. The Volney Felt Mill is a wholly owned subsidiary, shall we say, of the Fry Roofing Company?

A. That is correct.

Q. Is the State of Arkansas within the sales and distribution of the Memphis operation?

A. It is.

Q. And is the sale and distribution of the roofing in Arkansas under your supervision?

A. Yes.

Q. As well as the manufacture of the roofing, that is sold and distributed?

A. Yes, sir.

Q. With respect to the transportation of your products in Arkansas, is there any intra-state transportation, that is, between one point in Arkansas and another point in Arkansas?

A. No.

Q. Is it an accurate statement to say that all of your transportation from Arkansas is intra-state in character?

A. Yes, sir, that is from Memphis into the State of Arkansas.

Q. Relatively speaking, what is the comparative size of [fol. 70] the Lloyd A. Fry Roofing Company in manufacturing roofing, among such companies in the United States?

A. I understand from our owner that we are the largest manufacturers of composition roofing in the United States, operating, I believe, today 19 plants to Portland, Oregon, down through Compton, California, Houston, Texas, and all the way around to Jacksonville, Florida, up to Carolina, across Massachusetts, Minneapolis, and to Chicago, covering the United States.

Q. You spoke of the Volney operation as obtaining raw materials which are processed into felt for subsequent use in the roofing operation. Do you obtain raw materials for such use in the State of Arkansas?

A. Yes. We pick up the raw materials in the State of Arkansas.

Q. And return those materials to Memphis in the trucks that haul your roofing from Memphis to Arkansas?

A. That is correct.

Q. Is it an accurate statement that all of the movement of the raw materials is an inter-state movement from points in Arkansas to Memphis, Tennessee?

A. Yes, sir.

Q. How many employess do you have in Memphis?

A. Approximately—between 170 and 175.

Q. Do you have one category as employees designated as drivers or truck drivers?

A. We do.

Q. How many of such employees do you have?

A. I think we have today 12.

[fol. 71] Q. Will you describe for us, Mr. Hecht, the method employed and the procedure followed by your Company in employing truck drivers?

A. We employ a truck driver the same as we do other employees. They go through the screen. They must pass our physical, which is by a resident doctor of Memphis. He fills out an application blank and we investigate his character, his safety record, and investigate the man fully.

Q. May I interrupt you?

A. Yes.

Q. At this point, let me ask you how many of your drivers have been arrested in comparison to having been stopped by other men prior to this restraining order?

A. I believe there was four.

Q. Were those drivers—Max Leonard Pate, was he one of them?

A. Yes, sir.

Q. And Joe H. Ragland?

A. Yes, sir.

Q. And John Pershing Boshers?

A. Yes, sir.

Q. And Dick Glen Allen?

A. Yes.

Q. I believe you stated—correction; strike that question. Now for the purpose of illustrating your method of employment in dealing with your drivers, have you at my request had photostatic copies made of pertinent records to the employment of these four men that have been arrested?

A. We have.

[fol. 72] Thereupon said photostats were introduced and received into evidence and marked Exhibits #1 through #4, inclusive, for identification.

[fol. 73] Mr. Elliott (Continuing):

Q. I hand you, Mr. Hecht, four photostatic copies headed at the top "Application for Employment", the first being Dick Glen Allen and second, John Pershing Boshers; and Joe H. Ragland; and fourth, Max Leonard Pate. I will ask you whether or not those are true copies of the original applications for employment executed by those four men when they applied to you for employment?

A. They are, sir.

Mr. Elliott: If Your Honor please, we offer the four photostatic copies for identification, as Exhibits #1, #2, #3 and #4.

Mr. Elliott (Continuing):

Q. These forms show the date upon which the driver applied to you for employment?

A. They do.

Q. Are these the dates upon which his physical examination was made? —for example, referring to #1, Dick Glen Allen. It appears that he was examined by the physician on October 26, 1949?

A. That is correct.

Q. The information at the top portion of the application being: Place of Birth; Date; Social Security No.; and Experience; Licenses Now Held; Information with respect to Past Arrests or Bonds; and History of Past Illnesses; as well as the Record of Employment. From whom did you take that information—the personal information with respect to the applicant?

A. We take it from the applicant and then further investigate if these questions he has given—the answers he has given are true.

[fol. 74] Q. That—obtaining their information and filling out the form—is the first step in the application for employment?

A. That is correct.

Q. Who directs the physician to whom the applicant will report for his physical examination?

A. My employee or dispatcher, Mr. Reisener.

Q. Anyway, the Fry Roofing Company selects the doctor?

A. Yes, sir.

Q. To whom did he make his report of the physical examination?

A. Fry Roofing Company.

Q. Who pays for the physical examination?

A. Fry Roofing Company.

Q. Is there any further investigation made by Fry Roofing Company, assuming that the physician's report is satisfactory?

A. As to bond, is that what you refer to?

Q. Any contacting of references?

A. Yes, we investigate character references and the ability of the man, as I have stated before. If these answers are correct he has put down, we go further and investigate his character and what type of a worker he is.

Q. Now, is the procedure which you followed with these four employees the same that you follow with all other truck drivers?

A. Identically.

Q. Is that the same procedure you followed with respect to other types of employees, as well?

A. The same.

Q. Assuming, then, that you agree to employ a man, what, [fol. 75] if anything, do you do with respect to having the truck driver apply for a bond?

A. We have him to fill out an application for a bond. Thereupon said Applications for Bond were introduced and received into evidence and marked as Exhibits #5 through #8, inclusive, for identification.

Mr. Elliott (Continuing):

Q. I hand you four applications for The Travelers Indemnity Company for fidelity bonds, photostatic copies of such applications executed by four employees you mentioned above, and I hand them to you in the same order as mentioned above, and ask you if those are true and correct copies of the original applications for fidelity bonds made by these four employees at the time they applied for employment or in connection with their employment?

A. They are.

Mr. Elliott: We will ask, if Your Honor please, that they be marked for identification as Exhibits #5, #6, #7 and #8.

Mr. Elliott (Continuing):

Q. Were these four employees bonded by The Travelers Indemnity Company as your employees?

A. They were.

[fol. 76] Q. You procured this information with respect to the employee from the employee?

A. Yes.

Q. Then what investigation do you make—that is, with reference to contacting references and former employers, and so on, before the employee is bonded or employed?

A. Before he is employed or bonded, we investigate, Mr. Reisener, his former connections has given to us either by phone or letter.

Q. Upon what basis are the truck drivers employed?

A. Do you mean identify that in compensation, or what?

Q. As an hourly rate.

A. So much per mile.

Q. Are there any additional compensations they receive, other than so much per mile?

A. Yes. We pay them for a pick-up. In other words, if we gave them an order to pick up any waste paper or rags in Little Rock, we would pay them for a pick-up. If they were an intermediate stop, then we would pay them so much for the intermediate stop as well as, in that particular case, as a destination stop. Where there is only a destination, we pay them their regular mileage pay.

Q. Do you have a transportation payroll that consists of the transportation drivers in your employ?

A. We do.

Q. At my request, have you taken the work weeks in which the arrests of these four men were employed; and had photostatic copies made of the three payrolls involved? [fol. 77] A. We did.

Q. The arrests of two of the men, that is, Allen and Pate, were made in one week? They are both reflected in one payroll?

A. Yes.

Q. Are these photostats which I hand you true and accurate reproductions of the three payrolls involved?

A. They are.

Q. And are they representative of your payrolls for such employees and similar employees throughout the entire time you have been engaged in hiring truck drivers?

A. It is.

Mr. Elliott: Before I question him further, if Your Honor please, may I offer the three payrolls, being the payrolls ending December 4, 1949; January 28, 1950; and May 6, 1950, for identification as Exhibits #9, #10 and #11, respectively?

Thereupon said photostatic copies were introduced and received into evidence and marked as Exhibits #9, #10 and #11 for identification.

[fol. 78] Mr. Elliott (Continuing):

Q. Now, Mr. Hecht, I will ask you to refer to one of these payrolls, say for the payrolls for the week ending December 4, 1949. That is the payroll of the transportation payroll for the Memphis plant for that period?

A. This is the drivers' payroll for this period.

Q. The first column, I take it, is the name of the driver?

A. That is correct.

Q. Now, what is reflected by the second column, which is numbered "Column 1"?

Mr. Warren: Before we go into this, before they start testifying, I think we had better get them admitted. I want to object to these.

The Court: Your objection, I suppose, is to the fact they are copies and not the original records?

Mr. Warren: We object because they are not the original records, they are not complete and they are purporting to reflect evidence without giving us an opportunity for any cross examination. They purport to show only part of the records of this company as to these particular people. He hasn't said they are complete. Of course, if they are complete, we'll withdraw that.

The Court: You can ask him about it. I think that is under the modern system of the introduction of evidence. Where photostatic copies are not originals—if they are not originals, if they agree, you may have an agent to go over there and examine their originals. They may be admitted. [fol. 79] Mr. Elliott (Continuing):

Q. Mr. Hecht, with respect to all of these records introduced, you have the originals here in the court room which you may submit to counsel for examination?

A. We do.

Mr. Elliott: As a matter of fact, I am examining the witness from the originals. We had three photostats, one for the witness, the Court, and the defendant.

The Court: Do you have all of the records here?

Mr. Elliott: Yes, sir.

Mr. Warren: I am talking about these three items. That is objectionable from the fidelity bonds. It is an attempt to introduce evidence into there without the opportunity

of cross examination. The statements were made by declarations from the purported questions without them present for us to cross-examine at all. The testimony has—his statements are made from the application for a bond and is not admissible unless we have an opportunity to cross-examine.

The Court: If he doesn't know—they did take out a bond—they would be admissible. If they did take out a bond, I don't think the State is concerned about it, with representations made to The Travelers of Hartford. That is what applications are put in for.

Mr. Elliott: The statement is "Do you own personal property? . . . No . . ."

The Court: The Travelers have bonded these men for \$5,000, and that bond stands good. It is purely a fidelity bond.

[fol. 80] Mr. Elliott: Correct, Your Honor.

The Court: Under that bond they make collections from these people they deliver merchandise.

Mr. Elliott: No, sir, it makes them responsible as our employees. The fidelity bond is just a general practice to insure the company against defalcations on the part of the employees.

Mr. Warren: I object to that statement going in without the bond being here as evidence in the case. Will the company agree, since these are their employees, to make them available to the State of Arkansas for the purpose of taking their depositions in the offices at Memphis? Do you see what difficulty we are in?

The Court: I don't see why, Mr. Warren, what difference that makes.

Mr. Warren: It makes a great deal of difference who owns that truck. The application says "Do you own any personal property? . . . No . . .". Two of these applications have salary scratched out so much a month. It is purely hearsay.

The Court: You are not bringing a civil action against these drivers.

Mr. Warren: I am arresting these drivers individually as owning trucks.

The Court: You can put them in jail if they violate a law.

Mr. Warren: You have got me under an injunction without—we are making a record, now.

[fol. 81] The Court: You can do that later on.

Mr. Warren: And I have got to protect this record, and I can't vouch for the statements of these employees—so-called employees, going in the record to show they are employees, so the reports say, showing the other things without making them available for cross-examination. These are the people we arrested, and these people are trying to absolve them by statements they made for bond. I will concede they made them take out a bond.

Mr. Elliott: We are trying to show the usual and customary course of employment. I'll tell you as a matter of fact, I haven't even read the application for the bond. All I know is that the company, in the due course of its operation, where a man applies to them for employment, they make him take out a fidelity bond and we are showing we have done that.

Mr. Warren: If that is the case, the application hasn't got any place in the record. But in the record, unexplained and without us having any opportunity to cross-examine, it is certainly damaging.

The Court: I think this must be the material—the question as to whether or not this driver owned his vehicle—now that might become material. Under your theory it is highly material. I don't know whether it's material as to whether he is solvent, because you can put him in jail if he is violating the law. You would be satisfied to take these four men you arrested—

Mr. Warren (Interrupting): I mean take their depositions. I want to take their depositions.

[fol. 82] The Court: You can examine them on the proposition of whether they own the truck. As I understand your opening statement, some do and some don't. Mr. Whittington leases some trucks from the owners and then you hire the owners of the truck. You don't pay him any lease for that.

Mr. Elliott: We have nothing to do with any arrangement between the owner and Mr. Whittington. We en-

deavored to show exactly which of the drivers employed at this time own any equipment and which do not, and specifically the equipment. Insofar as the application for the fidelity bonds are concerned, the sole purpose that we introduced those applications is to present to the Court our entire records with respect to the customary procedure in the employment of truck drivers. And we selected these four simply because these were the four arrests, and the witness, if he has not, he will testify they are identical with all of the other procedures—the same as all other drivers employed. The applications have no significance in this procedure.

The Court: I don't think, either, Mr. Warren— It seems to me that if they will stipulate that a number of their drivers, no matter where they are, arrests or not, own the vehicles they drive, that is all you care for, isn't it?

Mr. Warren: No, sir, that is not all I care for. I want to request— They are their employees. They have gone to great length to tell they are employees and all of this control they have over them, and it is strictly Fry Roofing Company. I want them to make them available to the State of Arkansas. They are non-residents—they are out of [fol. 83] the State. I want them to make them available for cross-examining them, and make them available. They put on the testimony to show they are employed. It is partial testimony; it doesn't reveal the true facts of this record. It is not in accordance with our investigation.

The Court: It is going to be considerable trouble and delay. All you could prove by them is they own the trucks. According to your opening statement, they own the trucks, and they leased the trucks to Whittington, and in turn Whittington furnished their names to the company, and all of that constituted an evasion of the Arkansas law. If they will stipulate that any number of the men—one, five, or all of them—own their vehicles, it seems to me if your contention is correct, that will put you in shape where you can argue. We know they own their vehicles; they leased them to Whittington, who is under contract with the Fry Company. Whittington furnishes their names to the Fry Company and they make an application.

Mr. Warren: They wouldn't stipulate to that. I want to make a request and ask the Court to order the plaintiff to make available for the purpose of cross-examination or examination or taking their deposition, to the State of Arkansas, these employees. We will take them at their convenience and we will come to Memphis to take them.

The Court: I don't see any objection to it.

Mr. Warren: They won't do it unless you order them.

The Court: I think it is all right. You say they won't make that stipulation I suggested? Maybe they will.

[fol. 84] Mr. Tarlowski: I think the testimony will show it.

The Court: According to their opening statement, the proof will be some of these drivers own their own vehicles and have leased them to Whittington, and Whittington has leased them in turn to Fry Roofing Company. Now that is according to their opening statement.

Mr. Warren: We want to go into this.

Mr. Elliott: Let us complete our proof.

Mr. Warren: All that brought this up is our objecting your putting in the application for fidelity bonds.

The Court: We can pass to that question later, as to any fidelity bonds. The Court orders them to make them available and we'll strike this testimony.

Mr. Warren: I am asking now that the Court order them to make these folks available to take their deposition.

The Court: Let them finish their proof, and then make that objection.

Mr. Elliott: If the Court please, counsel for the State has put so much in the record for making the employees available for depositions, I want to advise the Court although this case has been pending for months, counsel for the State has made no effort to seek these people, and it behooves me to object at this time for the State to come in at this late date and make such a request. They haven't asked us to produce them.

The Court: Let them make their proof. I think myself it is going to cause a delay. I don't believe you have enough objection or would have any objection to letting them take [fol. 85] depositions.

Mr. Elliott: No, we won't.

The Court: I think the four men under arrest would be the only ones.

Mr. Warren: No, sir, we want to take them all. They won't get hurt. We are under restraining order; they won't get hurt at all. I think I talked to Mr. Tarlowski and found he didn't have the authority to permit the depositions and suggested that I call Mr. Elliott.

Mr. Elliott: Suggested, you call, or he call?

Mr. Warren: Suggested that I call you.

Mr. Elliott: But you didn't do it.

Mr. Warren: No, I did not do it. I determined that it was part of wisdom to wait and make the request of the Court.

Mr. Tarlowski: I want the record to show Mr. Warren called me last Friday at two o'clock, and I made a notation of it, and that was the first time since this cause has been filed we have had any discussion with witnesses. At that time he asked me if these men were going to be here, and I said I assumed they would, but I didn't know. I want the record to be clear. The first conversation was held last Friday, which was September 1st. He wanted to know if J. A. Mayo and also Mr. Whittington and the drivers would be present at the hearing. Now that is the conversation.

The Court: It might have been better to contact them and have that understanding, but if he figured they would be here and they are not here, wait until you finish your [fol. 86] testimony and he can make such objection.

Mr. Elliott: He had no reason to figure they would be here. He made no effort to make them available here.

Mr. Warren: I had no way to get them here. That is a personal attack.

The Court: They are non-residents. Mr. Tarlowski presumed they would be here.

Mr. Tarlowski: I am not the guardian.

The Court: He wasn't chief counsel.

Mr. Warren: From all of this testimony, I thought Fry Roofing Company was not the agent. The agent relationship still exists.

The Court: He is local attorney for the case. Let's finish the record here and go on.

Mr. Elliott (Continuing):

Q. I believe, Mr. Hecht, we were discussing the payroll for the drivers for the payroll ending December 4, 1949. You say the driver's name is in the left-hand column and the next one is what?—total mileage?

A. That is the total mileage they travel during the current week or the week just completed.

Q. From what source did you ascertain that mileage?

A. From the miles traveled during that week by speedometer records.

Q. That is, the Fry Roofing Company representative obtained that mileage from the equipment driven by that driver on that work week?

A. Yes, sir.

[fol. 87] Q. The next column, "Rate", "5½", what does that mean?

A. That is 5½c a mile we pay them.

Q. The next column, headed "1 x 2", what is that?

A. You will find that is 5½ times the mileage, which represents the dollars across the top. Allen received \$100.65.

Q. That is the amount of mileage he earned during the work week?

A. At 5½c a mile, yes.

Q. The next column, "Stop-Over Fees". What is that?

A. That man made two stop-overs. That is, he made an intermediate stop in destination, and we paid him four and a half dollars for that time.

Q. By a stop-over, a partial delivery, where he makes a partial delivery, part of a load?

A. He gets \$4.00, yes. That is in order to compensate him for the time he has lost in actual driving by making two unloadings instead of one.

Q. These drivers unload the merchandise themselves?

A. Yes, sir, through the tail gate.

Q. You pay them \$4.00 per stop-over?

A. Intermediate stops, that is right.

Q. This next column, "Miscellaneous"—I don't see any entries on either of the payrolls you have here, under Miscellaneous. Then "Gross Pay"—does that consist both of mileage fees and stop-over fees?

A. That would consist of column 1, 2, and the stop-over.

Q. And now the next column, "O. A. B.", what is that?

A. That is Old Age Benefit.

Q. Commonly known as Social Security tax?

[fol. 88] A. Frankly, yes. That is it.

Mr. Warren: Your testimony is, that was Social Security?

A. No, that is Old Age Benefit.

Mr. Elliott: I changed the question as to Old Age Benefits.

Mr. Warren: But let's get it clear.

Mr. Elliott: I said it was Old Age Benefits.

A. (Witness answering) I said yes to Social Security—

Mr. Warren: Yes, after he corrected the statement to Old Age Benefit.

The Court: You can cross-examine him.

Mr. Warren: I am trying to get the testimony.

Mr. Elliott (Continuing):

Q. Under the next, "Unemployment Compensation", there is nothing under that?

A. There is no entry there.

Q. Then the next, under "Federal Withholding Tax". Does that reflect the amounts per week that you deduct from the employees?

A. That is correct.

Q. In the "O. A. B." Column, when you deduct Old Age Benefits?

A. Yes, sir.

Q. The Old Age Benefits, are they sums held by your company or are they reported to the Federal Government?

A. The Old Age Benefits are reported to the Federal Government.

Q. The next column. On the first Transportation Payroll, December 4, 1949, there do not appear to be any entries in the "Insurance" column. Do you recall how long it was [fol. 89] after you inaugurated this transportation system, how long it was after a driver was—strike that whole question physically, and let me straighten it out, please. Before we get into the insurance question, let me ask you

this: Do you have a blanket health, life and accident insurance policy on all employees, that is, employees who elected to participate?

A. Those who elected to participate, yes.

Q. Now, how long does a person have to be employed by you before he is eligible to participate in the insurance?

A. I believe it is sixty days.

Q. Now, this transportation system was set up by Lloyd

A. Fry Roofing Company at Memphis approximately when?

A. November 2nd, 1949.

Q. Then when this payroll made up December 4, 1949, was prepared, no driver had been employed long enough to participate in the insurance program?

A. Not to that particular date, no.

Q. Refer, however, to the payroll the week ending May 6, 1950. I notice there appears the names of drivers Allen, Boshers, Mayo, Pate and Wells; that there are figures entered in the column designated "Insurance". What does that reflect?

A. They reflect the deductions from their pay to participate, that they and their families and dependents may participate in our group insurance policy.

Q. Are the benefits of that policy, or is the option to participate in that policy, open to anybody except employees of Lloyd A. Fry Roofing Company and through them to their families?

A. No.

[fol. 90] Q. Would it be an accurate statement to say that the certificates under the group policy could not be procured or issued to anybody other than an employee of Lloyd A. Fry Roofing Company?

A. Yes, sir.

Q. Am I correct to say that the payroll of May 6, 1950, reflects as of that time five of the nine drivers on your payroll had elected to participate in the group insurance?

A. That is correct. Some of them that have taken it out since, were not eligible for participation at that time.

Q. I believe you chose these work weeks because these were the work weeks in which the arrests were made?

A. That is correct.

Q. The next column, the "Total Deductions", at that time includes Old Age Benefit, insurance and Federal and State withholding tax?

A. Yes, sir.

Q. And the "Net Pay" the amount which the employees actually receive for his week's work?

A. Yes, sir.

Q. And the next column, "Check Number". Is that the check number of the Lloyd A. Fry Roofing Company, by which the compensation was paid?

A. Yes.

Q. We have been talking at some length about the payroll of May 6th, because it contains all of the items in question. Do you have for the State the checks by which these four employees that we have been discussing were paid on that work week of that pay period?

[fol. 91] A. Yes.

Q. That is for employees Allen, Pate, Boshers and Ragland?

A. Yes.

Q. The payroll for May 6, 1950, contains the name of two Boshers. Is the one we have been discussing spelled Boshers—J. P. Boshers—John Pershing?

A. Yes, sir, John.

Mr. Elliott: I offer for identification as the next exhibit #12 for the status of a composite for the State, check number 13924, payable to J. P. Boshers; check number 13923, payable to Dick G. Allen; check number 13930, payable to Joe H. Ragland; and check number 13929, payable to Max L. Pate, all being dated May 10, 1950. The Lloyd A. Fry Roofing Company signed by W. L. Garner, drawn on the North Side Branch of The First National Bank of Memphis, Tennessee, showing on the face of the check Total Wages, Old Age Benefits, Withholding, Group or Hospital Insurance, Total Deductions, and Net Pay.

Thereupon said photostatic copy of checks was introduced and received into evidence and marked as Exhibit #12 for identification.

[fol. 92] Mr. Elliott (Continuing):

Q. Those are the checks issued to the employees and negotiated to the four employees covering a work week ending May 6, 1950?

A. Yes, sir.

Q. Did I understand through inadvertence you failed to bring the original of the checks with you, and do you agree to bring them with you if counsel wishes to see them?

A. Yes, sir.

Q. Now, when these drivers were employed, who determines the basis on which they will be employed and fixes the compensation which they will receive?

A. The Lloyd A. Fry Roofing Company.

Q. When examining the applicant for employment, is any question raised or any consideration raised as to whether he may or may not own a tractor or any automotive equipment?

A. None whatsoever.

Q. Is there any discussion in your discussion with the applicant as to whether or not he owns or proposes to procure any motor vehicle equipment?

A. No, sir.

Mr. Warren: I want to object to that question and answer, and the question immediately prior and answer, for the reason the proper foundation has not been laid. This gentleman has not testified that he is the man who had the discussion or he is the man that employed these men.

The Court: He must either do that, employ them, or lay down the rules.

[fol. 93] Mr. Warren: If he has laid down a rule, he doesn't make any difference. He asked if there was any discussion.

The Court: It didn't make any difference whether he owns a truck or not. I don't think that is material.

Mr. Warren: Save my exceptions. I just want to make my record.

The Court: They are going to stipulate that some of these men own trucks, I think, because I know under your theory it might be material.

Mr. Elliott (Continuing):

Q. Let me ask you this question, Mr. Hecht, in view of the objection. Are all of these drivers either personally employed by you or under your immediate supervision?

A. They are.

Q. Do you personally in some instances perform all of the functions on behalf of the Lloyd A. Fry Roofing Company?

A. I have.

Q. Is there any difference in the compensation paid to a driver who owns equipment or a driver who does not own equipment?

A. There is none.

Q. Is there any discussion whatsoever with the applicant for employment as to whether he proposes to lease equipment to Frank Whittington or anyone else?

A. There is none.

Mr. Warren: I renew my objection. Note my exceptions—save my exceptions.

Mr. Elliott (Continuing):

Q. Now, Mr. Hecht, these mileage rates you pay, did I ask whether or not that was the same for either a full or [fol. 94] empty mileage?

A. It is the same.

Q. Is there any difference in the amount you pay the driver depending on the number of pounds which may be loaded on his vehicle?

A. It is all based on a mileage or miles driven, loaded or empty.

Q. Who determines what will be loaded on a vehicle or what will be transported on any given trip, the driver or the Lloyd A. Fry Roofing Company?

A. The Lloyd A. Fry Roofing Company in fulfilling the orders.

Q. Who determines when the merchandise of the company will be transported and where it will be transported?

A. The Lloyd A. Fry Roofing Company.

Q. Who determines the time of drivers or anticipated time of delivery, of the delivering time?

A. The Lloyd A. Fry Roofing Company.

Q. Who loads the merchandise into the trucks?

A. The Lloyd A. Fry Roofing Company.

Q. Is there anything transported on the trucks driven by these drivers other than merchandise belonging to Lloyd A. Fry Roofing Company?

A. Definitely not.

Q. While these drivers are in the employ of the Lloyd A. Fry Roofing Company, are they permitted to work for anyone else?

A. They are not.

Q. Are they permitted to use the motor vehicle equipment leased to you, which we are going to discuss in a few minutes—are they permitted to use that equipment for any purpose other than performing transportation of the Lloyd [fol. 95] A. Fry products as directed by Lloyd A. Fry Company?

A. Very definitely not.

Q. Does Frank Whittington have anything whatsoever to do with the employment of drivers by Lloyd A. Fry Roofing Company?

A. Absolutely none.

Q. What, if anything, does he have to do with setting the compensation paid drivers by Fry Roofing Company?

A. None whatsoever.

Q. What authority does Whittington have with respect to the discharge of drivers?

A. He has none.

Q. Who discharges them?

A. The Lloyd A. Fry Roofing Company.

Q. As a matter of fact, since you began the employment of truck drivers, have you had occasion to discharge one or more?

A. The more recent one, yes, was Mr. Wells. As soon as I got his report of an accident.

Q. You personally discharged him?

A. I personally took care of the matter—had Mr. Wojcik to discharge him, which he did immediately.

Q. That was under your supervision?

A. That is correct.

Q. Are you familiar with the safety regulations, with the hours of service regulations of the Interstate Commerce Commission relative to private carriers?

A. In general.

[fol. 96] Q. Does the medical examination which you require the applicants to have for driver positions conform to the requirements of the Interstate Commerce Commission?

A. Yes, sir.

Q. Do you require your drivers to keep daily driver's logs on forms prescribed by the Interstate Commerce Commission, being Form BMC 59?

A. We do.

Q. For these four drivers they have mentioned, on the days for which they were arrested, simply for the purpose of—for example, the keeping of logs, have you had for the State the driver's logs for the four drivers, on such four days?

A. We have.

Q. One of the logs, I believe, covers a period, laps over on a two day, so you have the two sheets for that log for the State?

A. Yes.

Q. Was your answer that one of the logs did consist of two sheets, November 28 and 29, 1949?

Mr. Warren: Let the record show that the witness is examining the logs just testified about.

A. (Witness answering) Yes.

Mr. Elliott: If the Court please, we offer for identification the Driver's Daily Log for January 24, 1950, of Dick Allen; the Driver's Daily Log of January 24, 1950, of M. L. Pate, Exhibit #14; and Exhibit #15, the Driver's Daily Log for May 2, 1950, of Joe Ragland; and Exhibit #16, the Driver's Daily Log for November 28, 1949, of J. P. Boshers.

[fol. 97] Thereupon said documents, Driver's Daily Log, were introduced and received into evidence and marked Exhibits #13, #14, #15, and #16, for identification.

Mr. Elliott (Continuing):

Q. Referring, Mr. Hecht, for example, to the log of Joe Ragland dated May 2, 1950, is that a typical driver's log as kept by your drivers?

A. Yes, it is.

Q. It shows for the particular day in question, for example, on the top line, numbered 1, on the left, "off duty".

A. Yes.

Q. And by drawing the pencil mark from the beginning of the columns on the left at midnight through to the figure 5, does that not indicate to you that the driver was off duty from midnight until five o'clock in the morning?

A. It does.

Q. And then, dropping down to the third column, "driving", does that not indicate to you that at five o'clock in the morning he left the plant driving his equipment and at 5:30 across the Tennessee-Arkansas and continued to drive until 8:30 in the morning?

A. It does.

Q. And then—I realize this is somewhat leading, Your Honor, but I am simply trying to expedite—

Mr. Warren: I don't think it makes any difference [fol. 98] whether I object or not.

Mr. Elliott (Continuing):

Q. Then, does the log indicate to you that the employee was off duty then from 8:30 in the morning until 12:30 in the afternoon, at which time he resumed driving?

A. It does.

Q. And drove from 12:30 until 2 o'clock in the afternoon?

A. It does.

Q. I notice, then, the period between two o'clock and four o'clock in the afternoon he has written down in the bottom, "law". Is that the time he was on duty not driving, because he was under arrest of the Arkansas officials?

A. That is my interpretation of it.

Q. He so advised you that is what that means?

A. Yes, sir.

Q. He returned to his driving duty at four o'clock in the afternoon and got back into Tennessee at 5:30 p. m., and then again went off duty?

A. That is correct.

Q. At 5:30 p. m.? A similar log is kept every day for each driver? That is, the driver himself keeps the log?

A. Yes, sir.

Q. Who requires him to keep the log, Frank Whittington?

A. The Lloyd A. Fry Roofing Company.

Q. Who does the driver deliver his log daily to?

A. Lloyd A. Fry Roofing Company.

Q. Who keeps the logs for inspection for the Interstate [fol. 99] Commerce Commission?

A. The Lloyd A. Fry Roofing Company.

Q. I believe you said these are Lloyd A. Fry Roofing Company—I mean Interstate Commerce Commission official logs?

A. Yes, sir.

Q. In the delivery of your merchandise, do the drivers have waybills or bills of lading or whatever sort of type of ticket or receipt do they carry?

A. We have a delivery ticket.

Q. Answer my question. Do you transmit your merchandise by the use of bills of lading?

A. No, sir.

Q. By waybills?

A. No, sir.

Q. I hand you four photostats headed at the top "File Copy" "Delivery Ticket", and ask you whether those tickets were pulled by you from your files as being, as near as you can tell, tickets used by the drivers in transporting merchandise on the dates they were arrested?

A. They are.

Q. Are those tickets typical of all tickets used by your drivers when they make their deliveries?

A. They are.

Q. It simply shows the amount and kind of merchandise, the total weight, provides for the name and address, consignee, the date, the driver's initials, the factory order number, the tractor number, the trailer number and the signature of the consignee?

[fol. 100] A. That is correct.

Q. Where are the others kept, in Memphis or Chicago?

A. In Memphis.

Q. I notice they are not signed. Do you require the consignee's signature only on the originals?

A. The driver is supposed to have a copy in there, but they are sometimes torn and are not properly pulled out, but the originals all have the acceptance initials.

Q. These, then, are simply representative of the system employed by you in turning your merchandise over to your driver, and he in turn receiving a receipt for it from the consignee?

A. That is correct.

Q. Sometimes called delivery ticket and sometimes dray tickets?

A. Yes.

Mr. Elliott: If Your Honor please, we offer for identification the four Delivery Tickets, the photostats, as Exhibits #17, #18, #19 and #20, and have the originals for examination by counsel if he so desires.

--Thereupon documents purporting to be Delivery Tickets were introduced and received into evidence and marked as Exhibits #17, #18, #19 and #20, respectively, for identification.

[fol. 101] Mr. Elliott (Continuing):

Q. Mr. Hecht, does your company have an established vacation plan or program for its employees?

A. We do.

Q. Do these truck drivers get the benefit of the same vacation period or status as all other employees?

A. They get a vacation period the same as all other employees.

Q. Do these drivers enjoy the workmen's compensation benefits as do other employees?

A. They do.

Q. State whether or not you have any program or rules and regulations with respect to reports to be made as to the condition of the tractors and trailers at the end of each trip. Describe it for us.

A. We have a form in which a driver fills out any necessary defects or failures or anything that has taken place since he left our plant until he returns. It is put down on this form and is checked by our dispatcher.

Q. To whom does the driver make report with respect to the condition of the equipment at the end of a trip?

A. The Lloyd A. Fry Roofing Company.

Q. Does he make any report whatsoever to Frank Whittington?

A. None whatsoever.

Q. Going back to the driver's daily logs, does he make any report to Whittington with respect to the driver logs or any report to the hours worked?

A. None whatsoever.

[fol. 102] Q. Do you recall how long ago it was you started the set-up, the form, for the equipment inspection report?

A. I am vague on that, but that was not in the very beginning. It was shortly after the beginning.

Q. I hand you herewith three such reports, purporting to cover inspections made by driver Pate—Max Pate—on January 24, 1950, one by driver Joe Ragland on May 2nd, 1950, and one by Dick Allen on January 24th, 1950. Have you at my request had notes made of these reports?

A. I have.

Q. Being the dates you were advised these men were arrested?

A. Yes.

Q. State whether or not these reports are representative of the daily reports made by all drivers on the condition of their equipment.

A. They are.

Q. And they are made to whom?

A. The Lloyd A. Fry Roofing Company.

Q. Who requires the drivers to make these checks and reports on the condition of the equipment?

A. The Lloyd A. Fry Roofing Company.

Q. Does Frank Whittington—what, if anything, does Frank Whittington have to do with requiring drivers to make reports on the condition of equipment?

A. None.

Mr. Elliott: If Your Honor please, we offer the three reports for identification as Exhibits #21, #22 and #23. [fol. 103] Thereupon said Equipment Inspection Reports were introduced and received into evidence and marked

as Exhibits #21, #22 and #23, respectively, for identification.

The Court: And you have the original subject to inspection?

Mr. Elliott: I have the originals here and offer them for counsel's inspection if he wishes.

Mr. Elliott (Continuing):

Q. I believe you stated that the Lloyd A. Fry Roofing Company directed the drivers as to when, where and to whom transportation was to be performed.

A. That is correct.

Q. Is there any discretion invested in the driver as to whether he will or will not take a trip directed by Fry, assuming that he has had his statutory hours of rest?

A. No, he must go where the Lloyd A. Fry Roofing Company sends him.

Q. To whom do these drivers make reports of accidents that may occur during their driving?

A. To the Lloyd A. Fry Roofing Company.

Q. To whom do drivers make reports of arrests, for example, such as are involved in this proceeding?

A. To the Lloyd A. Fry Roofing Company.

Q. Who posted the bonds for the drivers and equipment on the arrests, for example, involved in this proceeding?

[fol. 104] A. There were two or three by Lloyd A. Fry Roofing Company and the first one by The Travelers Insurance Company, I think.

Q. Who made the arrangements with The Travelers Insurance Company?

A. The Lloyd A. Fry Roofing Company.

Mr. Elliott: If Your Honor please, I have here similar exhibits covering—that is, with respect to the drivers' payroll, transportation payroll, and pay checks by which drivers were paid for at least one week in every month since the existing plan has been in effect.

Mr. Warren: When was that?

Mr. Elliott: Approximately November 1 or 2, 1949.

The Court: And it is stipulated between counsel—

Mr. Elliott: Between counsel that the exhibits with re-

spect to the four employees we have been discussing are representative of the same things with respect to all other drivers employed.

Mr. Warren: It is stipulated by counsel that the company has been doing business or operating in the manner demonstrated by the exhibits since November 1st, 1949.

Mr. Elliott: I want your agreement with respect to the drivers, that is, the payrolls and pay checks that we put in on these four employees are representative of the payrolls with respect to all other drivers.

Mr. Warren: That is agreeable to us, yes, sir.

Mr. Elliott (Continuing):

Q. Now, Mr. Hecht, as Exhibit A to the complaint, the original complaint in this case, there is attached what purports to be a true and correct copy of a leasing agreement [fol. 105] entered into between Frank Whittington and Lloyd A. Fry Roofing Company on September 30th, 1949. Have you had an opportunity to read that copy, or do you have a photostatic copy of the original with you?

A. Yes, sir, this is the same as the original.

Q. To the best of your knowledge, the copy attached to the complaint is a true and correct copy of the original attached to the lease?

A. Yes, sir.

Q. Just to be sure an accurate copy is attached to the record, have you had prepared a photostatic copy of the original signed lease?

A. We have.

Mr. Warren: We will stipulate that Exhibit A is a copy of the lease between Whittington and Fry Roofing Company.

Mr. Elliott: It is stipulated and agreed between counsel that the copy of the lease, as well as Schedules A and B thereto, attached to the complaint are true and correct copies of the lease and of such schedules.

Mr. Warren: All right.

Mr. Elliott (Continuing):

Q. Now, Mr. Hecht, pursuant to the leasing agreement attached to the complaint and Schedules A and B thereto,

did Frank Whittington turn over to Fry Roofing Company the equipment described in Schedule A?

A. He did.

Q. Do you still operate the equipment described in Schedule A, or has it been added to or has it been changed in any respect since the bill was filed?

[fol. 106] A. It has been added to, and some of the original tractors are out of service, having been replaced by others.

Q. Do you have an equipment list of the equipment being operated at this time?

A. I don't believe we have it complete this morning here.

Q. Well, could you summarize and tell us, before we go into Exhibit A any further, how many trailers are you leasing from Whittington and operating at this time?

A. Eighteen.

Q. And how many tractors are you leasing from Whittington and operating at this time?

A. Twelve.

Q. Now, what is your information with respect to who owns the trailers?

Mr. Warren: I want to object to that. That is the rankest hearsay.

The Court: If he knows.

Mr. Warren: He asked what was his information.

The Court: If it's accurate information. In other words, the form of the question might be a little misleading. Do you have knowledge as to the ownership?

A. (Witness answering) I understand Whittington is buying all of the trailers from the Fruehauf-Carter Company.

Mr. Warren: That is very prejudicial.

Mr. Elliott: I asked it simply because I thought counsel wanted the correct information.

Mr. Warren: Mr. Whittington is here, and he can tell. [fol. 107] The Court: I imagine if they had a list—I don't think it's so material. My idea, if they will stipulate some of these tractors and trailers are owned individually by some of the drivers and leased to Whittington and re-leased

to them, that that is all you could possibly prove. Isn't that correct? Now, I don't know that they will stipulate that.

Mr. Warren: I am not going to agree to that. I can't, because I am going to ask the Court to allow me to take the depositions of these employees.

Mr. Elliott: We will stipulate that of the 12 tractors the witness says are now being leased by Whittington for the Fry Roofing Company and operated by the Fry Roofing Company, that seven of those tractors are owned by Whittington and that five of those tractors are being leased by Whittington from people who are drivers for Fry Roofing Company and in turn re-leased by Whittington to the Lloyd A. Fry Roofing Company. We will so stipulate.

Mr. Warren: I can't stipulate to a thing like that. I have no way of knowing. It is an attempt to foreclose me from finding out.

The Court: If they agree to it.

Mr. Warren: How can I agree to that?

The Court: I think when they admitted that part of the drivers—some of the drivers, if your construction of the law is correct, that was your opening statement that it was a gross effort on their part by taking drivers and leasing equipment from them and getting Fry to hire the drivers.

[fol. 108] Mr. Warren: That is right, and that is my opening statement.

The Court: It was a statement against interest. I was thinking about the long drawn out thinking.

Mr. Warren: I am thinking about me getting charged with dereliction of duty there in making this record for the State. I am in a very peculiar position of handling the case when there is already an attorney appointed after I was asked to try the case. I am trying to build as good a record as I can. I am in one of those peculiar positions.

The Court: That would be just as good as all of them. I don't think it would make any difference.

Mr. Warren: Of course I do, Your Honor.

The Court: If you want to go into it further and make your proof, you can make such motion as you deem proper. I want to get all of the facts in this record.

Mr. Warren: I do, too, because I assume it is a test case.

The Court: That would go up and come back, and take two or three trips up there. If we get a good record, one will suffice.

Mr. Elliott: We are doing our best.

The Court: I am bound to hold the witness' answer is purely hearsay. He says he understands that to be the fact.

Mr. Elliott: I haven't asked the witness about tractors. I asked him solely about the trailers, and that was the question to which the objection was interposed.

[fol. 109] The Court: How many trailers have you?

A: (Witness answering) Eighteen.

The Court: I thought you asked him about the tractors.

Mr. Elliott: I offered to stipulate how many tractors we own.

The Court: I thought it was his statement.

Mr. Elliott: It would be his statement if he were permitted to testify.

The Court: I am holding that it is hearsay.

Mr. Warren: I mean Mr. Elliott's testimony. It would be as to the tractors. It is an unusual way to get it in the record.

The Court: It is not in the record in a way it is competent. We will just have to make that proof by some other means than this witness. I will let the question be answered for the purpose of the record, if you want to. Chancery cases go up *de novo* in this State, and the Court will hold it is incompetent. I believe it would be better to have it in the record by someone who knows.

Mr. Elliott: I don't know of anyone connected with the Fry Roofing Company who has any knowledge as to the tractors and trailers.

The Court: You have Whittington here, who knows what he owns and what he doesn't own.

Mr. Elliott: If the testimony of this witness is not competent as to the ownership, then we withdraw the—just [fol. 110] strike that statement, and I will pursue the matter further in a different way.

Mr. Elliott (Continuing):

Q. Mr. Hecht, at the time the lease was executed between Fry and Whittington, of Schedule A, did you have any knowledge whatsoever as to the ownership of the tractors or trailers?

A. The trailers at that time, which were 12 in number, were bought by Frank Whittington.

Q. Now, do you know that of your own knowledge, and if you do, tell us the basis of your owning. Otherwise, it will be hearsay.

A. The trailers were a little bit — in delivering, and I went down to the Fruehauf-Carter in Memphis and asked if Frank Whittington's trailers would be ready for delivery on time. Mr. — I am trying to recall the manager's name — the manager of the trailer company said they would be ready for Whittington when they were asked for delivery of them, which would be approximately November 1.

Mr. Warren: I object to that, and ask that it be stricken. It is purely hearsay.

The Court: I don't think so, if he talked to the manager. Were the trailers delivered in the way the man who sold them to Whittington said they would be?

A. (Witness answering) Yes, sir.

Mr. Warren: The ownership of trucks can't be proven by hearsay. There is a proper way to prove ownership.

The Court: There would be as far as the Revenue Department is concerned.

Mr. Warren: And it would be as far as the people super-[fol. 111] vising the management of these trucks.

The Court: He told the Fry agent they would be ready for delivery at the contract time of about November 1st, and they were delivered then. I think that makes it competent. Of course, you can go into it if that is not true.

Mr. Warren: Save our exceptions.

The Court: You can go over there and get the records of that company very easily.

Mr. Warren: Will Your Honor allow us an opportunity to do that?

The Court: I don't think I can order anybody who is

not a party here, or an employee or agent. I think I can give you the right to take testimony of anybody connected with the Fry people that are employees, but I don't see how you can take the agent because he is a non-resident and not a party to the litigation, and there is no way we can do it; in my opinion,

Mr. Warren: Save our exceptions.

Mr. Elliott (Continuing):

Q. Were these trailers specially designed in construction for the transportation of your commodity?

A. They were.

Q. Were you and other representatives of your company in contact with the manufacturer, and did you not deal with the manufacturer in designing the equipment?

A. We dealt with the manufacturer in the designing of the equipment specifically for our merchandise.

Q. And as the trailers referred to by the manufacturers throughout the course of construction, who was it?

[fol. 112] Mr. Warren: I object to that.

The Court: I will let it in if he knows.

Mr. Elliott: I'll withdraw the question.

Mr. Elliott (Continuing):

Q. After the construction of the trailers—strike that. Let's put it this way. Did you or not confer with Mr. Whittington as well, with respect to the design and construction of the trailers?

A. I did.

Q. And were the trailers constructed according to the design and pattern worked out between yourself and Whittington and the Fruehauf Trailer Company?

A. It was.

Q. Who delivered the newly-manufactured trailer from Fruehauf to you?

A. Frank Whittington.

Q. At the time you entered into the lease attached to the exhibit, did you have any information with respect to — owned or did not own the tractors reflected by Exhibit A?

A. I did not know who owned the tractors exhibited by Exhibit A here.

Q. And upon such modifications as have taken place since that time by virtue of changing by adding to the equipment, has it been of any concern to Fry Roofing Company as to who owned the tractors leased by Whittington to Fry?

A. None whatsoever.

Q. Does the fact that a person—strike that question. Have you ever contacted Mr. Whittington and suggested, directly or indirectly, that he lease equipment from any driver?

[fol. 113] A. I have not. It is no concern of mine who he leases equipment from.

Q. Have you had any connection whatever with any equipment lease agreements between Whittington and anybody?

A. Absolutely none.

Q. Except the lease between Fry and Whittington?

A. That is all.

Q. Does the Fry Roofing Company have any control over the amount which Whittington may pay an equipment owner for the use of his equipment?

A. No, sir.

Q. Does the amount which you pay to Whittington—strike that question, please. In ascertaining the amount which Fry Roofing Company will pay to Whittington for the use of the equipment leased to Fry, is any amount which Whittington may pay someone else taken in consideration?

A. No, sir.

Q. Is it any concern of the Fry Roofing Company?

A. No, sir.

Q. At the time the Fry Roofing Company employs these drivers, what agreement, if any, is there between Fry and the driver that he will be assigned to driving equipment owned by him which he may lease to Whittington?

A. None.

Q. As a matter of fact, do the drivers, even those drivers that may own equipment, do they in all instances drive the equipment which they own?

[fol. 114] A. They have none.

Q. You were telling me in our conferences, Mr. Hecht, something about safety meetings or an equipment use

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meeting which you held with these drivers during the early days of this arrangement. Do you recall the meeting at which instructions were given to drivers with respect to the equipment?

A. Yes, sir.

Q. Will you tell the Court approximately when the meeting was held and what instructions were given the drivers as to the use of the equipment and operation?

A. We have held two of them. The last one was the early part of this year, at which time we told the drivers what their duties were in unloading, and we rehearsed again that they had absolutely no control over where they were to go, when they were going, or what equipment that they were to drive; that they were assigned to certain equipment and that we would perhaps keep them on that equipment, because I feel personally that you get better care taken of equipment by one man being assigned to a piece of machinery. He is naturally interested in that because he is being paid for the miles driven, and if his tractor is broken down, he is going to blame it on someone else and cause a furor among the drivers. If you give me an old one, it just doesn't work out. So we tell them, "You boys are going to be assigned to these tractors and you will stay on them. There will be sometimes we will ask you to be assigned to other tractors, and there will be no objections. You men understand what you are to do, and if there is any objections, we want to know now." [fol. 115] Q. Now, during the period of the lease, under whose direction and control is the equipment leased from Whittington?

A. Will you repeat that?

Q. I say, this equipment you lease from Whittington, after it is turned over to you, who then directs and controls what use you make of it?

A. The Lloyd A. Fry Roofing Company.

Q. Are these drivers permitted to engage in other employment while they are driving for you?

A. No, sir.

Q. Are they permitted to use this equipment you use for the transportation, for the transporting of goods other than by Fry?

A. No, sir.

Q. Who directs and dictates the color the vehicles are to be painted?

A. The Lloyd A. Fry Roofing Company.

Q. Whose advertising and lettering appears on the vehicles?

A. The lettering is Lloyd A. Fry Roofing Company.

Q. In whose name are the licenses purchased?

A. The Lloyd A. Fry Roofing Company.

Q. Who carries the public liability and property damage on the vehicles?

A. The Lloyd A. Fry Roofing Company.

Q. Is Frank Whittington in any manner whatsoever responsible for the safety of the cargo transported on these vehicles?

A. No, sir.

Q. Is any report whatsoever made to Whittington as to the commodity handled on the vehicles, when or where [fol. 116] it is delivered, or the condition it is delivered?

A. No, sir.

Q. The lease, I believe, is a three-year lease. Is that correct?

A. That is correct.

Q. In your position, Mr. Hecht, you are in charge of the records of the company with respect to total sales from Memphis?

A. I am.

Q. And in turn are you in charge of the records reflecting transportation costs and return?

A. I am.

Q. Would you tell us, Mr. Hecht, the approximate percentage the returns from transporting your products bear to the total sales for any given period, say November 1 to the latest date you can give?

A. From November 1 to the close of business, the August business, it is less than 6%.

Q. In other words, the returns from transportation are less than 6% of the total returns from the operation of the business?

A. That is correct.

Q. Can you tell us, Mr. Hecht, whether or not the trans-

portation of your products since November 1, 1949, has resulted in profit or deficit to the company?

A. The operation of the trucks, of course, are at a loss.

Q. That is what I mean, the motor carrier transportation.

A. It has been at a loss to the company.

Q. You do transport some of your merchandise by rail? [fol. 117] A. We do.

Q. And that portion is not taken in consideration in determining the deficit?

A. No, sir.

Q. Would you tell us approximately what the deficit has been since November 1, 1949?

A. It has been a little in excess of \$14,000.

Q. That is for the Memphis operation?

A. That is for the Memphis operation only.

Q. And that operation included the operation into the State of Arkansas?

A. Yes, sir.

Q. Would it be a fair statement to say that you are engaged in the business of manufacturing and selling roofing, and not engaged in the transportation business?

A. Yes, sir.

Mr. Warren: I believe that the testimony of counsel should be stricken.

Therefore an adjournment for lunch was taken at 12:30 p. m. until 2:30 p. m., at which time the following proceedings were had:

[fol. 118] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Elliott: If Your Honor please, this morning there was some considerable, or rather quite a number of statements made by counsel for the State with respect to availability of these drivers who had been arrested, as well as Mr. Whittington, as witnesses in the case. As we advised the Court at that time, we had not been requested to have them available, and neither had we been requested to submit them for examination or the taking of their testimony by way of deposition or interrogatories. We assured the

Court at that time, and reiterate the assurance we have no purpose other than for all of the relevant facts to be placed before the Court in the proceeding. We have ascertained during the noon recess that we can have each of these four drivers who have been arrested, present in court in the morning if counsel for the State wishes to use them. We have ascertained, also, that we can have Mr. Whittington present in the morning, but there are, as we understand, a number of criminal warrants outstanding, or summonses—I don't know your term in Arkansas—summonses or warrants outstanding against Mr. Whittington relative to these arrests, which have never been served on Mr. Whittington. We will present him and have him in court in the morning either under order of the Court or upon agreement of the State that no effort will be made, if we bring him in Arkansas, to serve these warrants that are now outstanding.

The Court: Well, it's going to take quite some time to go into that. I'm afraid what we are going to have to do is fix another date. I have domestic relations day set for tomorrow. Sometimes it's not so heavy, and sometimes it is heavy. I'm afraid to take testimony of these drivers [fol. 119] and Mr. Whittington and then for the State to put on their testimony, it will be another full day.

Mr. Elliott: We don't wish to present them as witnesses, but bring them, and if counsel for the State wishes to examine them he may do so. We don't consider their testimony material to our case.

Mr. Warren: I think you are certainly correct we are going to have another day. We can't get through today. I am only special counsel for the State in the trial of this one matter. I certainly would not approve or condone any matter the State or any of its officials may have. I asked for these people to be present without having to serve them with any warrants or subpoenas. I have no control over them. I suggest that I take their depositions in Tennessee so that I can examine them, and I would presume you will not in any way attempt to embarrass these people, but somebody might do it, and you would feel I also would do it.

The Court: I think that is it. Let the record show that the motion to take depositions of 12 drivers is overruled

until the Court finds out what the testimony of Whittington will disclose.

Mr. Elliott: If Your Honor please, at the conclusion of the morning hearing I would like to ask Mr. Hecht a few more questions.

[fol. 120] Thereupon Mr. Leon Hecht resumed the stand and testified as follows:

Mr. Elliott (Continuing):

Q. Mr. Hecht, during the morning session you were testifying with respect to these transportation payrolls and what the different columns on the payrolls reflected. For example, I have before me Exhibit #10, the payroll for May 6, 1950. There was some question with respect to this figure entered under the column "O. A. B.", indicating Old Age Benefits. I will ask you whether or not, Mr. Hecht, that figure entered under that column is a consolidation of all of the Social Security deductions?

A. I have since learned that it is. I have called my office to ascertain that.

Q. It includes all of the Social Security deductions which you report to the Federal Government, supplemented by the percentage the company is forced to pay?

A. Yes, sir.

Q. The withholding tax is deducted separately?

A. Yes, sir.

Q. On your Equipment Inspection Reports which you have filed—which you have filed as representative reports, I have before me, for example, Exhibit #21. Down at the bottom, the statement is made "Equipment to be checked by dispatcher and Lessor's agent, prior to leaving plant". That statement appears on the Equipment Inspection Report?

A. Yes, sir.

Q. I will ask you whether or not it is a fact that it is one of the duties of the lessor, Mr. Whittington, to furnish an [fol. 121] employ on your premises to make minor adjustments and repairs and inspect the equipment daily?

A. Yes, sir.

Q. What are some of the services to the equipment that

are performed by Whittington under his lease with you, on your premises as distinguished from his garage?

A. Well, such as if a tail light bulb is burnt out or a deflector is cracked or if a tire, a spare is flat, a correction is made there. If there is a squeeze on a door, something of that nature that only requires a few minutes to keep that equipment rolling, they make that repair right there on the premises.

Q. Minor adjustments and day to day servicing?

A. Yes, sir.

Q. What established rule or practice do you have with respect to frequency or regularity with which the equipment is to be returned to Whittington for a thorough check?

A. It has to go down once a week for complete inspection to keep it in good running order.

Q. Now, I have gotten the impression that some, at least, of the tractors—tractor equipment—which you are operating, perhaps belongs to some of the men whom you employ as drivers?

A. Yes, it does, but I don't know who those men are in its entirety.

Q. Speaking specifically with respect to any equipment which the record may ultimately disclose as belonging to a person whom you employ as a driver, I want to ask you some questions about that owner-driver authority with respect to the equipment. What is the situation with respect to the authority of the owner-driver to say when or where or what will be transported?

A. They have no authority whatsoever to say what, when or where anything will be done pertaining to our operation.

Q. What authority, if any, does the operator-driver have with respect to saying who will operate the equipment?

A. They have no authority of any degree whatsoever.

Q. What authority, if any, do these owner-drivers have with respect to ordering repairs to the equipment or directing the delivery of equipment to Whittington or any other garage for repairs?

A. They don't have any. We direct that.

Q. Now, if I ask you the same questions with respect to

Whittington's authority with respect to the owner-driver, would your answer be the same?

A. They would be the same. Whittington has no authority whatsoever or any control over any equipment movement or merchandise.

Q. You have testified that in the period since the inauguration of this method of transportation, that in the Memphis operation your motor carrier operation has resulted in deficit of some \$14,000. Am I correct?

A. Yes.

Q. I think the Court would be interested in knowing why you have determined to use this method of transportation, even at a monetary loss, if you will tell us briefly why you determined to adopt the system and why you used it even at a monetary loss.

A. I think it is perfectly obvious that today business is done on service rendered, taking for granted the merchandise is of a quality nature. We have found that we can [fol. 123] retain and secure business from dealers that we could not get if we employed other types of transportation. I will state that we have a truck going to John Doe at Burning Stump, Arkansas. We expected to leave at four o'clock Wednesday morning for delivery at 7:30 Thursday. I send out a postal card Tuesday to the dealer that he may expect my truck to arrive there Thursday morning. Your quick unloading will be appreciated. He can order that truck, "Will you take that 50 feet down there and put it in that roofing shed", or "Will you deliver it around and put it in the roofing shed across the street". That is a service. Many dealers supplying on large housing projects or other types, he wants the merchandise delivered on the job. We deliver it on the job. There are approximately 130, -40, -50, depending on the weight of the merchandise, squares going to that job. He wants three squares there. He will say, "Will you put 23 squares down at the middle of that house?". We absolutely eliminate the dealer on those jobs—the traffic labor cost. We render by this type of operation, and it secures business for us, business we couldn't possibly get otherwise. We are running 24 hours a day, six days a week, in one division—that is the roofing division, and seven days a week in the other division. That

is the felt division and that is the maximum, and yet I am behind, and I will say that is the volume of business we have.

Q. Under your present method of transporting, can you direct delivery to your customers at any point at any time during the 24 hours of the day?

[fol. 124] A. We can, and we do. Now, to illustrate a little further the advantages to the plant—at Memphis I have a very limited warehouse space. The machines run around the clock. We can take that merchandise and put it on the floor and even increase our course of operation by another shipping crew picking it up and at some later time putting it into the trailers, even if we had the warehouse space, which we don't. We load from the machine right into the trailer 24 hours a day. When a man is eligible to leave there he will leave there at one, two, three, four, five o'clock, ten or eleven o'clock at night.

Q. Can you get a service like that from contract motor carriers?

A. I haven't been able to, and during the previous war, I had every trouble in the world, not only with motor carriers, but the common carriers, the railroads. We couldn't get the equipment to move our merchandise quickly.

Q. The contract and common carriers, as you know, operate under permits, particularly, specifically the areas which they serve. Do you understand that to be the case?

A. Yes, sir.

Q. What advantage is it—strike that question. In your experience, in your business, are you able to locate any common or contract motor carrier who are able to perform the service between your plant and the various points in Arkansas that you are now able to service in the system you are using?

A. No.

Q. What advantage, if any, is it to you and the customer to permit his merchandise to be transported the square route between the plant and the place it is to be delivered [fol. 125] without change of lading between vehicles en route?

A. I would like to clear that up. You are asking me what advantage it is to the dealer?

Q. Or the plant, in being able to have its merchandise transported from point of manufacture to the point of consumption without having to be shifted back and forth between vehicles?

A. The least handling of our merchandise delivers it to the ultimate consumer in a much better condition. If you scar the face of a shingle, then you have lost 1/80th or in some other instances a lesser, smaller, percentage of an area to be covered on that roof. We have cut down the dealer's and the contractor's or applicator's loss by our direct handling from our machines to the dealer and to the job sites.

Q. Did I ask you this morning about the trailers that you use being manufactured specially to your specifications?

A. We had them. We requested they do that and I should say manufacture them according to our specifications. That is because of our particular merchandise could not be properly loaded on what would be normally judged to be standard equipment. I will illustrate for you, if you care to. We have side door delivery. You drive into a narrow delivery door of a lumber shed. He's got a warehouse on this side and he's got a lumber stack over here (indicating). You couldn't back a trailer up into that door if you pulled it straight in. You would have to take off the tail gate around the back end, so we have side doors.

Q. In trailers?

[fol. 126] A. In the trailer, to drive right through that and unload from the side door.

Q. That is not conventional equipment for either contractor, common or contract carriers?

A. No, sir, and it is not necessary. We have the standard height of it in conducting it over the side of the roof and side walls. We can get a few more pounds of roofing into the trailer.

Q. What advantage, if any, is it to you not to have your commodities transported in vehicles handling other commodities at the same time, as common carriers do to less than truck loads?

A. Many times the merchandise is damaged in shipment

where it is mixed with other shipments. Any oils or anything of that nature will attract composition roofing—scar it. Many other things I could enumerate, several things that are detrimental to a mixed shipment.

Q. You feel, then, to summarize, your company feels that the service feature is more important to your company in developing and maintenance of its trade than the \$14,000 deficit in the transportation cost?

A. Very, very definitely.

Q. I notice you testify you now have 20 trailers and 12 tractors.

A. I think that was 18 trailers.

Q. 18 trailers and 12 tractors?

A. And 12 tractors.

Q. What relation does the 24 hour loading service direct to the trailers have in determining the net for the employment of a greater number of trailers than tractors?

[fol. 127]. A. I stated we have to load from the machine to the trailers, so we use those extra trailers as warehouse space, which would normally be warehouse space, therefore eliminating the number of men that it would take to again pick up that merchandise and load it into the warehouse if trailers were not there—if we waited for a complete unit to come in.

Q. Is it not true when there is one tractor and trailer on the road there is another trailer on the loading dock, loading, ready to leave when that trailer gets back?

A. That is true when the delivery is eligible to go out.

Q. With respect to the owner-drivers in all instances they didn't operate this equipment which they owned. For example, assuming that you have an owner-driver who has a tractor leased to Whittington, who in turn leases it to you, and that particular tractor breaks down. What is the effect of that on that man's equipment? Is he laid off when the tractor breaks down?

A. No, sir. I order another tractor from Whittington and he drives it.

Q. Now, take the same assumed case when you have a leased piece of equipment from an owner-driver and he becomes sick or disabled. Does that remove the tractor from service, or what is that case?

A. Not if I have another driver that is eligible.

Q. By that what do you mean?

A. I mean if there is a driver there that perhaps his tractor also needs repairs or his tractor is out of service, he will be put on the first tractor that goes out.

Q. Is it not a fact you attempt to appoint a crew of drivers adequate to keep all of the operating equipment [fol. 128] in operation?

A. We have to keep the merchandise from accumulating in the warehouse, which we don't have.

Q. I believe I asked you whether or not there was any agreement between you and an applicant for a driving position that he would be assigned to the operation of any particular equipment if he were employed?

A. I don't know whether I said that, but definitely not.

Q. Now let me pursue that one question further. Is there any equipment in practice, any agreement between you and Whittington, Fry and Whittington, or any practice between Fry and Whittington, that when you lease a piece of equipment from Whittington you will assign any particular driver on the operation of the equipment?

A. No, sir.

Q. There is none?

A. There is none.

Q. No agreement and no practice.

A. None whatsoever.

Q. My attention has been directed to a conference rule and order in case number R461 before the Arkansas Public Service Commission entitled "In the Matter of the Legality of Certain Motor Equipment Lease Practice". At the sake of repetition, I want to ask you brief questions with respect to ten items covered by the conference ruling and order to which my attention has been directed. State whether or not Mr. Whittington either directly or indirectly furnishes or selects the driver or drivers for the vehicles you lease from Whittington.

[fol. 129] A. He does not.

Q. State whether or not your lease with Mr. Whittington is for a single one-way trip or whether it is a long-term lease.

A. It is a long-term lease.

Q. And further in that connection, state whether or not Mr. Whittington, the lessor, takes possession of the vehicles leased by Fry from him for further leasing to other shippers for a return haul or after discharge of the cargo at destination.

A. He can't.

Q. Does he?

A. No.

Q. State whether or not Mr. Whittington, the lessor, assumes responsibility for safe delivery of the cargo transported, or furnishes cargo insurance.

A. He does not.

Q. State whether or not Mr. Whittington, the lessor, furnishes public liability and property damage insurance covering operation of the vehicles you lease from him, or recognizes any liability for operation of any such vehicles.

A. He does not.

Q. State whether or not the compensation which you pay Mr. Whittington as lessor, or which he collects from you, is a transportation charge or a charge based solely on the lease of the vehicle.

A. It is based on the lease of the vehicle.

Q. State whether or not Mr. Whittington as lessor issued receipts or bills of lading to you, the lessee, for the contents of the cargo hauled on the leased vehicle.

[fol. 130] A. He does not.

Q. State whether or not Mr. Whittington, the lessor, arranges for the segregation of the drivers' wages and has you, Fry, pay it and then credits the amount of such wages on the agreed total compensation to Whittington, the lessor, for the lease.

A. He does not.

Q. State whether or not the driver's daily logs are submitted first to Mr. Whittington, the lessor, and later transmitted to Fry, the lessee.

A. They do not.

Q. State whether or not Mr. Whittington as lessor exercises the principal control over the drivers of the vehicles, instead of that control being exercised by Fry as lessee.

A. He does not.

Q. And in that same connection state whether or not

Mr. Whittington as lessor exercises any control over either the leased equipment or the drivers of the equipment.

A. He does not.

Q. State whether or not, insofar as you know or are informed, there is any variation between the actual practice between Fry and Whittington or any failure to observe the provisions of the written lease.

A. I will ask you to read that again, please,—there is not.

Q. State whether or not there is any failure to observe the provisions of the written lease relating to the selection or control of drivers.

A. No.

[fol. 131] Q. Now, referring to the final and unnumbered paragraph of the order to which I have made reference, I will ask you whether or not, after delivery of this equipment by Whittington to you for your use under the written lease, Whittington as lessor, or in the event Whittington is not the owner, whether or not the owner of the equipment, as lessor, or whether Whittington has or exercises any control over the equipment, the driver of the equipment, or the operation of the equipment in any respect?

A. He or they do not.

Mr. Elliott: You may ask him.

Cross-examination:

Mr. Warren:

Q. Mr. Hecht, doesn't this lease agreement, that is, Exhibit A, in a great many ways limit the operation of Fry Roofing Company of these trucks?

Mr. Elliott: I want to object to that question, if I may.

The Court: Doesn't the operation of Exhibit A—

Mr. Warren (Interrupting): The man has just testified that it has not—it does not. There is no limit, there is no control by the drivers or Whittington. Now, the lease between Whittington and Fry Roofing Company has provisions in it limiting their operation and limiting their control. It speaks for itself, and I am just asking the man [fol. 132] if that isn't true.

The Court: Just read him those provisions.

Mr. Warren: I prefer to ask him.

Mr. Warren (Continuing):

Q. I will ask you if that lease doesn't limit their operation and control?

Mr. Warren: He has testified in generalities, attempting to get out from under this conference order. I could have objected.

The Court: I think finally the Court has to pass on the question of the testimony. He is a layman and I think you could cross-examine him as to whether this provides so and so and doesn't that control. You say there is no control?

Mr. Warren: He says specifically there was no control. I want to refresh his memory. This lease does control. If what I am asking him, if he says yes, there is no reason for me to go into the lease.

Mr. Elliott: My objection to the question was, he asked him if the lease didn't provide certain things. The lease speaks for itself, and it is in evidence.

Mr. Warren: He didn't have that fine rule of law in his direct examination. He had the witness testify to generalities. That is the last question he asked him.

The Court: That is right, and I think you have a right to cross-examine him. I think you should say to him, "Now you testified that there was no control by the driver or Whittington over this trip and the handling or anything else, but how are you going to explain the provisions of [fol. 133] the lease, and do you carry that out as the general manager over there?"

Mr. Warren: If he admits the lease controls, exercises control over them, gives them certain limits on the use, that is all I want in the record—the lease between Whittington and Fry.

A. (Witness answering) What article do you refer to?

Mr. Warren: I am referring to the entire lease.

Mr. Elliott: We admit for the purpose of—

Mr. Warren (Interrupting): I didn't ask for Mr. Elliott

to testify. I don't think he should be allowed to on cross-examination.

The Court: You are asking a layman about a legal matter.

Mr. Warren: He has been testifying about a legal matter for the last ten minutes. He doesn't do this, and he doesn't do that, under conference orders.

The Court: He hasn't asked him about each section of that lease. He asked him about the operation and generalities as to whether or not there was any control by Whittington over the drivers. He says there is not. They had no control over the handling of the merchandise and the handling of the equipment. The drivers had no control over the equipment they drove. Now you can point out in the lease exceptions to that, of course, if he will look that over and say if there is.

Mr. Warren: I was merely asking the man the first question. He testified in generalities. I asked him if the [fol. 134] lease didn't limit the control. If he says he doesn't know, that is what I want to know.

The Court: If he can answer that after looking it over, if he answers "no", then you can point out the specific provisions.

Mr. Warren: I can point that out. I want to call attention to it at this time. I want to ask that question again.

The Court: I will let you ask him. He is an intelligent man.

Mr. Warren: He has been testifying about it all morning and all day. It gets awful vague on cross-examination.

The Court: They haven't been cross-examining him on each paragraph of the lease.

Mr. Warren: The effect of the lease—the record is full of it, and he is testifying on purely legal matters.

The Court: Yes, sir, that is right.

Mr. Warren: And interpretation.

The Court: No, he is testifying to what the practice is, and he says that is all the rights they have. Now, if they have any rights beyond what he is testifying to—

Mr. Warren (Interrupting): He just goes through the order and gives ten different sections of it and testifies that

their operations, didn't come under this, and they didn't do that, and a lot of it is a question of fact, and now he becomes a layman when he gets on cross-examination.

The Court: It's all right to ask him about that. You should point out, not take an eight or ten page lease, but say if they have any control.

[fol. 135] Mr. Warren: I am going to stand on my question if I can.

The Court: I think it is too general.

Mr. Warren: Save my exceptions.

The Court: If you want to read that lease and refresh your memory and answer his question, that will be all right.

Mr. Elliott: I don't think his answer makes any difference. The lease speaks for itself.

The Court: I don't imagine these leases make any difference. He hasn't time to read matters of this kind, and if it's not operating under a lease, you should point it out to him. I think you should do that. I think his own counsel, if there is something in there they have overlooked, if he is willing to take the lease and read it, and if there is anything there that limits the authority of Fry should be brought out.

Mr. Warren: The statement was made by the witness. I want to make the witness clear. There was no control or limitation on the operation of these trucks after they got in the hands of Fry. I asked the question if the lease doesn't limit the control, and I understand Your Honor has overruled that question and I have saved my exceptions.

The Court: I didn't overrule it. It should be pointed out the particular provisions in the lease.

Mr. Elliott: I want to point out that counsel is definitely putting words in the witness' mouth. The witness didn't use those words at all.

The Court: He did generally, however.

[fol. 136] Mr. Warren: When it gets to the Supreme Court, the record will be written. We can point it out.

The Court: You have asked him a question. If he wants to answer it, he can. If he didn't answer it on the grounds it is too vague, without going over and conferring with counsel, the provision of the lease, I will let him do that. We can take a recess, if necessary.

Mr. Warren: If he says he is not familiar with the terms of the lease, that is all right with me.

The Court: He testified as to that operation, and he said Whittington nor the drivers neither had any control over the loading of the freight, the routing of the freight, the amount of load, or who would drive that truck, and that Fry had entire authority. Now, if there is anything in there that counsel wants—

Mr. Warren (Interrupting): I want the record to show the witness has now gone and conferred with Mr. Tarlowski.

Mr. Elliott: No, he didn't.

Mr. Warren: Didn't the witness go and confer with Mr. Tarlowski?

Mr. Elliott: That is not a fact.

Mr. Warren: Isn't it true, just while you were talking—I want the record to show the witness went to confer with Mr. Tarlowski.

The Court: He might have been asking him for a cigar. I don't know what he's talking about.

Mr. Warren: He's conferring with them. I want to [fol. 137] go ahead with this, and I want to ask that question, and I would like to ask it in the way I asked him; if Your Honor doesn't think it admissible, then there is nothing I can do about it.

The Court: I don't know what the question was.

A. (Witness answering) I think I understood the question; and I would only—if you will permit me to answer in my way.

Mr. Elliott: I want to state there hasn't been but one question asked, and I attempted to interpose an objection, and I haven't been afforded the opportunity by counsel yet to do so. My objection to the question as asked was that the lease is a written instrument and it speaks for itself, and otherwise the question calls for an interpretation which is not within the purview of this witness' position.

The Court: Well, I think that is true, and I think also that the question in an eight or ten page lease, if you point out any section or paragraph of that lease and ask

him if his conduct of operations isn't a violation of that, then I will see that he answers it.

Mr. Warren: I asked him the question I want him to answer.

The Court: All right. If he can't answer it, just say so. If he can answer it, well, answer it.

A. (Witness answering) That question is too vague.

Mr. Warren: That is all right.

The Court: You say it is a written instrument. Of course, by custom and practice, if from a certain investigation [fol. 138] of the lease Whittington had, and by custom and practice over a period of years, then the contract was made or waived, they can plead that. I would like to get the facts before the Court, whether they have been ignoring the provisions of the lease. I haven't read it. Go ahead.

Mr. Warren (Continuing):

Q. Now, Mr. Hecht, you testified in answer to counsel's question on cross-examination that there was a charge for the use of the leased vehicles. We are talking about #5, item 5, in this conference order, instead of a truck mile rate or a normal transportation charge—isn't that true?

A. Will you repeat that?

The Court: Show him #5 and let him look at it.

Mr. Warren: I am trying to start at the back so he can refresh his memory.

Mr. Warren (Continuing):

Q. Didn't you testify on direct examination that there was a charge for the use of the leased vehicles and not a truck mile rate or a normal transportation charge?

Mr. Elliott: If the Court please, the question I asked the witness has nothing whatsoever to do with the truck mile rate.

The Court: Let him answer. He's on cross-examination. If he doesn't know, he will answer it.

Mr. Elliott: I do think if he is going to repeat my questions he should repeat them correctly.

[fol. 139] A. (Witness answering) He is compensated.

Mr. Warren (Continuing):

Q. That is your answer, is it?

A. Yes, sir.

Q. Does the lessor collect from your compensation—
from you—on a truck mile rate?

A. The lessor, that is, Whittington, collects from me, yes.

Q. On a truck mile rate?

A. On a mileage basis.

Q. Is that a mileage—a truck mile rate?

A. You will have to permit me to answer in my layman's words. We pay him, as I have stated before, on a lease agreement for miles travelled.

Q. How much per mile?

Mr. Elliott: That is reflected by Schedule B of the lease.

A. (Witness answering) $15\frac{1}{2}c$, as set out in Schedule B.

The Court: How much?

A. $15\frac{1}{2}c$ per running mile, either way, both ways.

Mr. Warren (Continuing):

Q. Who did you say the Volney Felt Mills were?

A. They are wholly owned by Lloyd A. Fry Roofing Company.

Q. That is a separate corporation?

A. Yes, sir; wholly owned by Fry.

Q. Does it have the same directors?

A. The same directors—the same manager. I am the manager.

Q. You are the manager?

[fol. 140] A. I am the manager. All of my employees in the office do all of the work of the Volney Felt Mills' records.

Q. When you pick up raw materials for Volney Felt Mills, does your account or your books make a credit or reflect a credit to Fry Roofing Company and a charge against Volney Mills?

A. No, sir.

Q. You don't charge Volney Felt Mills on the books?

A. We don't charge them on the books.

Q. For their transportation?

A. For this return transportation.

Q. Is that to the best of your memory, or are you testifying that as a matter of fact? I am not trying to trap you.

A. I can only testify anything from memory, because your memory is your camera.

Q. How good is your memory on that?

A. Well, I don't know. You are trying to put words in my mouth.

Q. No, I am not. If your books happened —

A. (Interrupting) The only thing I know definitely and I am positive of that, is that I am alive and I am looking at you.

Q. That is about the effect of your testimony today, that you are just not positive about any of it?

A. I am very positive about everything that I have said, with exception of those things that are put in a vague form.

Q. So you are positive about more than that you are just alive?

A. I was.

Q. But on cross-examination you are not so positive. Is that correct?

[fol. 141] A. I am.

Q. Then are you positive about this charge made that there is no charge or no credit against Volney Felt Mills for this transportation by Fry Roofing Company?

A. That is correct.

Q. Could you give me about what your average trips in Arkansas since this new transportation system began?

A. You mean as to mileage or to place, or what?

Q. Just about the number of trips. The records will show that.

A. It varies very much from month to month. Sometimes there may be as many as 25 loads a month, and sometimes only six or seven.

Q. It runs anywhere from six to seven or up to 25?

A. It can run from zero up to 50.

Q. You haven't had a month where you haven't had trips in Arkansas?

A. I couldn't say that. I don't look at those records. My time is occupied generally about other things. I couldn't say where any truck goes nor when it goes.

Q. You couldn't say about the trips? That is not in your department?

A. That is under my supervision.

Q. Definitely, I mean. I am not trying to make you.

A. I think you are.

Q. You have your own opinion. I will say that you are not very cooperative. How many trucks of your own knowledge—the total number of trucks?

A. That I don't know. I understand there was—

Mr. Elliott: That is the same identical question he objected to when I asked him this morning. Go ahead and answer his question, Mr. Hecht.

Mr. Warren: I want to see whether his answer this afternoon is the same as it was this morning.

A. (Witness answering) I understand there are five.

Mr. Warren (Continuing):

Q. Do you have a list of the equipment that is being operated by you now?

A. Not with me.

Q. Will you furnish a list for the record, showing the license numbers and motor numbers of vehicles?

A. Yes, sir, when you come to Memphis, or at any time when the Court desires.

The Court: How about letting him get up the information, take it before a notary, and furnish it to the reporter?

Mr. Warren: I don't ask that it be sworn to.

Mr. Elliott: Mr. Whittington will have it, Your Honor, if he takes his deposition.

Mr. Warren: I have asked this witness to furnish it.

Mr. Elliott: We have no equipment except that leased from Whittington.

The Court: I understand that.

Mr. Elliott: We will be glad to get up a list and trans-

mit it to the reporter and let it be marked as Exhibit #1 to his cross-examination.

The Court: That it is being operated by Fry Roofing Company leased from Whittington and that we don't operate any equipment except that which is leased from [fol. 143] Whittington, and give the trucks and number of trailers and motor numbers and licenses, and just sign it.

Mr. Warren: Sign it, yes. It won't be necessary to swear to it.

Mr. Warren (Continuing):

Q. Mr. Hecht, this unemployment compensation column in your transportation payroll reflects that no sums are being paid to others. Doesn't Tennessee have any unemployment compensation law?

A. The employer doesn't contribute to it.

Mr. Elliott: For the benefit of counsel, there's no Tennessee unemployment compensation law with the exception of that that is tied in with the Federal law.

Mr. Warren: The employer doesn't make any contribution?

Mr. Elliott: Other than those reflected on the Old Age Benefits.

Mr. Warren (Continuing):

Q. Who made the payments of the premium on The Travelers Insurance Company policy?

A. The Lloyd A. Fry Roofing Company.

Q. That is not deducted from the driver or returned?

A. That is right.

Q. The drivers are paid 5½¢ a mile plus your stop-over fees?

A. That is correct, plus the other compensation such as stop-over and unloading.

Q. I note here on all of your transportation payrolls which were furnished and introduced, it was all 5½¢ a [fol. 144] mile. That is a standard flat rate?

A. That is standard flat rate.

Q. These men are not members of unions? You have no contractor?

A. No, we have no contract with the union.

Q. Do you have any written contract with the drivers?

A. No, other than their employment records.

Q. That is all, they are just employed at the will of the company, or whenever they get ready to quit? You have no regular contract?

A. No, sir.

Q. I believe you cleared that up. Your insurance in May is a blanket health and accident insurance policy in which the employee may participate if he desires?

A. He and his departments, and his life insurance as well.

Q. That is optional with him?

A. Yes, sir.

Q. Does your company, Mr. Hecht, have a copy of this lease between Whittington and the drivers?

A. I am sure that the general office does. I don't know at the Memphis plant.

Q. Are you familiar with the terms of that lease, Mr. Hecht?

A. Vaguely—in a vague way, yes.

Q. You have read it?

A. I would like to state here what I have to say pertaining to that lease on my operation with Whittington, that I understand is all based on Memphis. All of my statements are based on the Memphis plant. I have nothing to do with the other surrounding plants.

Q. I wanted to clear that up. The Lloyd A. Fry Roofing Company is one corporation? It is not the Memphis division, this Chicago division, and so forth?

A. It is one corporation, yes, sir.

Q. All of your operations?

A. Yes, sir.

Q. You are the manager of your Memphis division?

A. That is correct.

Q. Now, as I understand it, this leased equipment that is being employed is employed in various divisions with different people as owners or lessors of the property, of the trucks?

A. It is my understanding that the other plants have the same lease that I have. I can only speak for mine.

Q. With different people, not Mr. Whittington?

A. I couldn't answer that definitely.

Q. Have you read that lease of Whittington's?

A. I have read it. I read it last October, but I haven't retained the provisions of it in its entirety.

Q. Do you recall in the lease there that there is a provision that the owner of the truck, the owner-driver, must secure employment with Fry Roofing Company before the lease is valid between Whittington and the other driver?

Mr. Elliott: Now, if Your Honor please, if he is going to take Whittington's deposition, he will have a copy of his deposition. This man says that he has read it in October.

The Court: Do you have it?

[fol. 146] Mr. Elliott: No, sir. He is talking about Whittington's lease with the individual owners.

Mr. Warren: Mr. Hecht said he had read it, and I asked him if he had read it.

A. (Witness answering) I am sorry. That is an incorrect statement. I have never read the lease of Whittington's with the man that he may have leased some equipment from. No. I understood you to refer to the lease between the Fry Roofing Company and Whittington.

Mr. Warren: I will withdraw the question.

The Court: I made the same mistake the witness did.

Mr. Warren: I will withdraw the question.

Mr. Warren (Continuing):

Q. The question was between the owner-driver and Whittington. You haven't read that?

A. No, sir.

Q. Who is your policy of workmen's compensation with, or are you self-insured?

A. No, we are not self-insured. We changed recently. That is handled, with the general office in the insurance department.

Q. Out of Chicago?

Mr. Elliott: Did you wish me to furnish that information? It is The Travelers Insurance, which is handled through Chicago.

Mr. Warren: No, sir.

Mr. Warren (Continuing):

Q. You say you have an established vacation plan for employees? Your drivers are not paid during [fol. 147] vacation?

A. Certainly, and it is based thusly, that we take their year's earnings and divide that by 52. That represents one week's work and we give them a check for that amount and they are there for a period of five years. Our normal and other employees get two weeks and the same is true. We give the truck drivers two weeks.

Q. That is in accordance with the other employees?

A. That is right.

Q. Now, if the equipment turns up faulty or some defects appear in it, or some repairs are necessary, I believe Whittington makes those repairs?

A. We notify Whittington, and we send him the tractor and he makes the repairs. That is his obligation—to keep that equipment in running order.

Q. It is his obligation to keep equipment in good running condition?

A. Yes.

Q. And in such condition as to comply with the safety requirements and regulations of both the Federal Government and the States in which you operate?

A. Yes.

Q. If he doesn't get that equipment in that condition, what recourse do you have—that is, an operative motor carrier, what can you do?

A. Well, if he didn't, we would naturally eventually cancel the arrangement.

Q. Cancel the arrangement? I believe the Court asked you—I am hurrying to get over these, because I want to get through in time—I believe the Court asked you about [fol. 148] the equipment inspection report, and I believe you stated the equipment would be repaired by the lessor's agent.

A. That is right.

Q. Who is the lessor's agent? That is Mr. Whittington's man?

A. That is one of his men at the plant or around the

yard repairing equipment. Our dispatcher makes the inspection and Whittington's man makes the inspection, and our dispatcher says it is a light, or whatever it is.

Q. Both of them make this inspection, according to the exhibit here you put in? Whittington's man and your man?

A. Yes.

Q. Now, your lease requires that your employees, your drivers, make a report at the end of each day, on the condition of the equipment, which is given you, and you in turn furnish it to Mr. Whittington? You follow that out?

A. Upon their return to the plant each day.

Q. And that is in accordance with, and you follow out the terms of your lease agreement, that you require the drivers to make these inspection reports? They are handed to your dispatcher, whoever your man is, and furnished to Whittington?

A. That is right.

Q. I don't understand. / I want to ask you, Mr. Hecht, about the operation at a loss. On what standard, or how do you figure you had operated at a \$14,000 deficit?

A. That is an arbitrary figure that is set up by the Chicago office.

Q. On what basis do you operate at a loss? What if I open my automobile I operate at a loss every day, and [fol. 149] you do your personal one. Is that what it would cost you more than using commercial carriers, or how do you reach that \$14,000 figure?

A. That is the figure—the Chicago office will have to answer that. I can only answer what they have informed me—that my operation in Memphis is operated at a loss of a little over \$14,000.

Q. That is, your transportation operation?

A. Yes, sir.

Q. You don't have any income coming in there. There are no revenues for transportation?

A. That is another question and putting it in another light. I would say that the Chicago office will have to answer that. We have the invoices here—photostatic copies. It is a delivery price, and there is nothing other than that I can arrive at, or anyone in any of our plants.

Mr. Elliott: May I interpose at this point? You wouldn't be in the position of seeking to put something in Chicago you don't have here?

Mr. Warren: On cross-examination are you going to allow him—

The Court (Interrupting): Go ahead. Let him ask one question.

Mr. Elliott: The question is, do you have a representative of the Chicago office here who can give that information?

A. (Witness answering) Yes, sir.

The Court: You didn't know he had one? I would like [fol. 150] to have that man's testimony so you won't have to send depositions to Chicago, either on interrogatories or going up there.

Mr. Elliott: We have him right here in the room.

Mr. Warren (Continuing):

Q. Mr. Hecht, is your policy of operation there, if the driver owns the vehicle, the tractor, and the vehicle is in condition to operate and the driver is in condition to drive, and by that I mean he isn't ill, he drives his own vehicle? Is that true?

A. If I have assigned him to that one, he does.

Q. Don't you make it a policy to assign him to that—to his own vehicle—that vehicle?

A. I make it a policy where a man owns his own vehicle to assign him to it for the same reason I assign a man who does not own a vehicle to the same vehicle during its operation at the plant. That is good business.

Q. It is good business to let a man operate his own vehicle?

A. It is good business to let an individual also operate the same vehicle—the same tractor.

Q. That is what I understand your direct examination to be. At times when the vehicle is not capable of operation and it is out on maintenance, that driver is assigned to some other vehicle?

A. Yes, sir.

Q. If the driver happens to be ill or on vacation, then some other driver is assigned to his vehicle?

A. Yes, sir.

Q. That is what you mean?

[fol. 151] A. Yes, sir.

Q. What you mean by that, those are the exceptions to the rule, and your policy is a business policy. Good business policy is to assign the drivers to a particular vehicle?

A. And keep him on it.

Q. And keep him on it.

The Court: You mean by that, whether he owned it or whether he doesn't own it?

A. (Witness answering) Yes, sir, whether he owns it or not, a man is naturally interested.

The Court: Just like riding a horse, a man gets used to riding a horse.

A. (Witness answering) He looks after it and keeps it in trim.

Mr. Warren (Continuing):

Q. You don't employ the men, do you?

A. I have employed some of them. I do employ some of them. One of the dispatchers, he employes those I do not, or my assistant, Mr. Wojeik.

Q. What percentage of your men are sent to you by Mr. Whittington?

A. I don't think that Mr. Whittington has sent any of them in a long, long time. I don't know that he has anything directly or indirectly to do with anyone coming out to the plant for employment.

Q. Well, now—

A. (Witness answering, interrupting) We have—for your information, we have a waiting list of possibly 40 or 50 drivers that come around through the drivers' gossip list. The Greyhound Bus has a list of them. We have [fol. 152] a continual list of them.

Q. Those that Mr. Whittington leased their equipment, those were sent to you, or did you employ them and send them to Whittington?

A. I can't understand—I'll answer it this way. I don't know that Mr. Whittington leased any equipment before a fellow went to him and said he can go to work for Fry or "I have been employed by Fry". They have got to come

to me and get a job. Whittington has absolutely nothing to do with any of these men or any equipment that I lease from him.

Q. They have got to have a job from you before they can lease?

A. Yes, sir, before they can go to work.

Q. And before they can lease to Whittington?

A. I don't know about that. Mr. Whittington may have them on some other business.

Q. Whittington may do business with some other company?

A. I don't know. I said he could.

Q. You said he could, but as a matter of fact do you know whether or not he does or not?

A. I don't know.

Q. You don't know? Do you have an employee by the name of Ragland, Joe H. Ragland?

A. Yes, sir.

Q. Is he still working for you?

A. Yes, sir.

Mr. Warren: That is all.

[fol. 153]

Re-direct examination.

Mr. Elliott:

Q. Just one or two more questions, if I may. Is it, or not, true that you can fire these truck drivers at will?

A. I do. I have, and I can.

Q. Is it true that anybody other than the officials of Fry Roofing Company can?

A. They can't.

Q. You made a statement there, something about an arbitrary figure, and I want to be sure that the record is clear what you were talking about. Do you do the cost accounting in Memphis, or is that done in Chicago?

A. That is done in Chicago.

Q. Is your sales on an f. o. b. Memphis basis or an f. o. b. customer's door basis?

A. It is a delivery basis, recognized as ours until it is put off at the destination.

Q. By whom are the prices fixed, by Memphis or Chicago?

A. Chicago office.

Q. Is it not a fact you do have accurate information as to the exact cost of your motor carrier cost for the months of November 1, 1949, to June 30th, 1950?

A. Yes, I have.

Q. Have you furnished those figures to the Chicago office for their use in accounting purposes?

A. The Chicago office has those figures.

Mr. Elliott: I will introduce this exhibit, since it contains [fol. 154] other things which the Chicago witness may testify to from Chicago office.

Mr. Elliott (Continuing):

Q. I will ask whether or not you reported to the Chicago office motor carrier transportation costs, the period November 1, 1949, to June 30th, 1950, for the Memphis operation?

A. They are the figures that I have had to report to the Chicago office.

Q. To Chicago?

A. Yes, sir.

Mr. Warren: I want to object to this. I found out something about it, and now Mr. Elliott wants to put it on by the witness.

Mr. Elliott: No, I am not. I asked the witness to testify to one figure, whether or not that was taken from his records and furnished to Chicago, and I propose to put on a Chicago witness to show what use he made of it.

The Court: Yes; he knows what cost it takes to deliver that merchandise, but there will probably be other factors enter into it after he sent those figures up there to determine the loss.

Mr. Elliott (Continuing):

Q. Are you advised, Mr. Hecht, what portion of the price set by Chicago on the merchandise you sell and deliver to a specific point consists of manufacturing costs or profit or cost of transportation?

A. No, I can't.

[fol. 155] Q. They simply give you a figure, the merchandise delivered to a certain point will sell to a certain figure?

A. That is right.

Mr. Elliott: If Your Honor please, at this time we wish to offer in evidence the exhibits presented and marked for identification at the morning session, I believe Exhibits #1 through #23, inclusive, the exhibits being photostats, and we have original records here to sustain the records for comparative purposes.

The Court: We admit the photostatic records, and the State may look at the original records if necessary.

Mr. Warren: Please note my objections generally to the introduction of these applications for employment, applications on the fidelity bonds, because they contain purported statements of fact by drivers. We have asked the privilege to examine, and Your Honor has said he will postpone his ruling on that. We think they should not be allowed to put in applications that contain, shall we say, moot testimony, without our having an opportunity to cross-examine them.

The Court: Not on the grounds they are photostatic?

Mr. Warren: No, sir, I don't object to that, but we object to the putting in the testimony of these drivers by application, which has the effect of letting them testify without letting us have the privilege of cross-examining them.

Mr. Elliott: We are not submitting the exhibits for the purpose of showing any specific information furnished by any specific driver in connection with his application for [fol. 156] a bond or for employment, but simply to show the general course followed by the company in employing drivers.

Mr. Warren: I will admit that the applications for the fidelity bonds were made by these specific people, and also that applications for employment were made. Beyond that, if that is the sole purpose of showing it, it is not necessary to put the applications in with all of those statements.

The Court: I think that is right. In other words, they have insinuated you had to get Whittington's permission to hire these men and they came through him. All you want is to show they made application to you, and it is you, Fry, and Fry alone, that passes on the applications and employs them.

Mr. Elliott: And we listed and procure from them questions set out for the application for employment and the questions set out for the application on fidelity bonds, and these questions are not material and we are not interposing them for bond or employment to establishing any statement by any of these four men, but simply as being representative of the general custom and practice.

Mr. Warren: Of course, it is ridiculous that he puts the statement in they are not for any purpose, and once they get in—

The Court (Interrupting): You can stipulate in the record. The old saying, if you will put it in the record, the Court will get it. You might throw a skunk in the jury box and ask them not to smell it. In view of counsel's statement, I won't smell part of it. I think that is sufficient grounds for putting them in, so long as he is not [fol. 157] relying on their answers except as qualifications for employment.

Mr. Elliott: Exactly.

Witness excused.

MR. E. J. ELKBRIDGE, a witness called on behalf of the plaintiff, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination.

Mr. Tarlowski:

Q. Please state your name?

A. E. J. Eldridge.

Q. Where do you live?

A. Chicago, Illinois.

Q. What is your business?

A. General traffic manager for the Lloyd A. Fry Roofing Company and subsidiaries.

Q. How long have you occupied that position?

A. Two years.

Q. How long have you been engaged in the traffic business as a traffic manager?

A. Over 30 years.

Q. You have been in the hearing room throughout the [fol. 158] hearing of this case, have you not?

A. Yes, sir; I have.

Q. And you have heard the testimony of Mr. Hecht who preceded you?

A. I have.

Q. Have you caused to be made from the records of the Lloyd A. Fry Roofing Company a statement showing income and expenses derived and incurred in the motor transportation service from November 1, 1949, to June 30, 1950?

A. I did.

Q. Do you have before you that statement?

A. Yes, sir, I have.

Q. Now, will you explain to the Court the figures shown upon the statement, please, sir?

A. Well, that is a complete statement of the Memphis operation and under the heading of "income", we have outboud, which is the major item of \$84,622.37. This amount is a total of the arbitraries added to the Memphis base to make the delivered price. In other words, we have a base price FOB Memphis and we have delivered prices out in the territories served by the Memphis plant and we add to that Memphis base arbitrary amounts based on competitive conditions and such arbitrary amounts bear no relation to any freight rate of any truck company or railroad whatsoever.

Q. How are your products sold in the State of Arkansas?

A. Sold delivered destination.

Q. In other words, your invoices then only show one price and one figure?

[fol. 159] A. That is correct.

Q. Does your invoice given to the customers contain any item of transportation expense?

A. None whatsoever.

Q. Now then, further with reference to the statement which you have before you now, what is the item represented by inbound income?

A. That is as explained by Mr. Hecht, a certain percentage of these trucks pick up inbound raw materials and the company again arbitrarily credits his transportation payroll or expenses with arbitrary amounts for service and that total on the inbound is \$7,154.24, making a total income credited to the Memphis plant transportation \$91,776.61.

Q. Now then, with reference to the expenses, I take it that those items were paid as detailed by Mr. Hecht here this morning?

A. That is right. The payroll accounts carry the item of truck drivers' salaries which has been submitted in evidence. The traffic penalties are not on that, but as you see there, they are very minor amounts, \$15.00 and another traffic penalty of \$29.00, and the insurance—that is the public liability, bodily injury, which is a \$1,000,000/\$1,000,000 and \$1,000,000, which is the greatest amount you can carry and that is \$2,366.18. Our Workmen's Compensation and P. L. Insurance is \$318.24. The amount paid to Whittington is this big amount of \$74,416.29. Also, we have the payroll taxes. I don't know whether they are Federal or State—and the Sundry Items which is principally of bonds filed in Arkansas.

Q. Do you have anything to do with the preparing of the figures shown as income upon this statement or in [fol. 160] assessing the arbitrary amounts which are assessed as income?

A. The arbitrary amounts are set by the sales department; I have nothing to do with them, and as I stated before, they have no relation whatsoever to any transportation cost or any truck rates or any rail rates. They are purely arbitrary and based on competition.

Mr. Tarlowski: I believe that is all.

Cross-examination.

Mr. Warren:

Q. Mr. Eldridge, you say that is based on competition? That is based on what a competing person would charge and add to the freight rate?

A. That is one of the factors, except the Fry Roofing Company has a freight rate from the nearest producing point. That is one of the things we took in consideration. Other things are taken into consideration—I don't have full knowledge of them and am not in a position to testify, that these arbitrary amounts nowhere near compensate us for the expenses.

Q. Your arbitrary amounts are greater on items sold and hauled a longer distance than sold and hauled close to Memphis?

A. That isn't even true, because for example, the price we will say at Birmingham is the same as at Memphis.

Q. That is your base point?

[fol. 161] A. Yes, sir, that is the base point.

Q. Your items sold in Little Rock, Arkansas, is less than an item sold at Memphis?

A. It is exactly the same.

Q. A haul from Little Rock to Memphis?—

A. Is absorbed by the company.

Q. Where do you start adding on?

A. Well, of course—it is a long detailed explanation and I am not prepared to give it for this reason, because the mileage to a point that may be only 25 miles from Little Rock, could be 150 from Memphis, our producing point, and yet we would have to meet the competition of the plant at Little Rock.

Q. Mileage is all paid on competition?

A. Yes, sir, all on competition.

Q. You say inbound credits, and I don't understand. You say they are inbound credits of \$7,154.24. Who are they charged to? It is purely a bookkeeping item?

A. Yes, sir, a bookkeeping item.

Q. This Volney Felt which you haul for, Volney Felt—you charge that on your books against Volney Felt?

A. Yes, sir. It is two separate corporations, but all

housed in single-unit buildings, the same officers and the same directing personnel. In other words, I am the traffic manager for the Volney and for Fry, and it is purely for taxing purposes.

Q. It is charged against Volney?

A. That is correct.

Mr. Warren: I believe that is all.

[fol. 162] Re-direct examination.

Mr. Tarlowski: I want to offer the statement as an Exhibit to the testimony of the witness.

Thereupon, said statement was introduced and received into evidence and marked as Exhibit #24 hereto.

Mr. Elliott:

Q. The Volney to which you reflected on your exhibit you have filed is credited to the Lloyd A. Fry Roofing Company Memphis transportation account?

A. That is right. We have no transportation department as such.

Mr. Elliott: That is all.

Mr. Tarlowski: That is all.

Witness excused.

[fol. 163]

STIPULATION

Mr. Tarlowski: At this point I would like to call Mr. Chandler for the purpose of showing arrests made of the drivers whose names we have discussed here this morning and that trucks have been stopped by him in his official capacity pursuant to orders by the Arkansas Public Service Commission.

Mr. Warren: I'll stipulate that.

Mr. Tarlowski: Further, we stipulate pursuant to the instruction of the Commission he will continue to make the arrests unless he is finally enjoined from so doing by the Court.

Mr. Warren: No, I won't stipulate to that at all, and he won't so testify, to keep you from being surprised.

The Court: If you want to particularly dictate pursuant

to the instructions that he did make the arrests of these four men, you may do so—

Mr. Warren (Interrupting): Yes, sir.

The Court (Continuing): —and held up the trucks and compelled them to make bond.

Mr. Warren: That is right, the men made bond, yes, sir.

Mr. Elliott: And tried some of them, and some of the cases are now pending.

Mr. Warren: No charge against Fry Roofing Company.

The Court: I don't see why you can't dictate it into the record.

Mr. Tarlowski: It is stipulated and agreed by and between counsel that Winston Chandler, an enforcement officer of the Arkansas Public Service Commission, on November [fol. 164] ber 29, 1949 arrested J. B. Boshers at Carlisle, Arkansas, and filed charges against him and Frank E. Whittington for violation of Act No. 367 of 1941, Section 22. The next is on the 24th of January, 1950. He arrested M. L. Pate at DeValls Bluff, Arkansas, and charged M. L. Pate with violation of Act 367 of 1941, Section 22, and posted a \$100 cash bond in both cases; and then on the 24th day of January, 1950, driver Dick Allen at DeValls Bluff, charged with violation of Act 367 of 1941, Section 22, and Frank E. Whittington was also with the driver on that charge, and a \$100 bond was put up. The next was on May 2nd, 1950, Highway 70, east of DeValls Bluff, the driver was Joe H. Ragland, and he and Frank E. Whittington were charged with a violation of Act 367 of 1941, Section 22. A \$500 bond was asked for and guaranteed by attorney Jim Wrape at Memphis. Those were the four charges. It is further stipulated and agreed that all the cases except the case of Frank E. Whittington and J. P. Boshers are presently pending in the Justice of the Peace Court, Larry Church, at DeValls Bluff, Arkansas, and the case of the State of Arkansas against Frank E. Whittington and J. P. Boshers is pending on appeal in the Circuit Court of Lonoke County, Arkansas. It is further agreed and stipulated that Winston Chandler, an enforcement officer of the Arkansas Public Service Commission, in his official capacity, stopped and investigated on June 14, 1950,

on Highway 70, east of North Little Rock, and checked a truck and the identification on the side was Lloyd A. Fry Roofing Company, Truck License #2 P/7 Z203, loaded with roofing asphalt, consigned to Fones Bros. Hardware at [fol. 165] Little Rock, Arkansas. The driver was Knox R. Boshers, Tennessee chauffeur's license #1410028. Next, on the 26th day of June, 1950, he stopped a truck driven by Wallace Wasson, whose address is Milan, Tennessee, driving a truck License #2 P/7 Z 202, and the name on the truck was Lloyd A. Fry Roofing Company. He was loaded with roofing and asphalt and bundles of shingles, Fry Roofing Company bill #21541, dated June 26, 1950, consigned to the Long-Bell Lumber Company, Little Rock, Arkansas. On the 26th day of June, 1950, at DeValls Bluff, Arkansas, he stopped a truck driven by Wallace P. Wasson. The truck was identified as a Lloyd A. Fry Roofing Company truck, loaded with 20 bales of mixed paper, consigned to the Volney Felt Mills, 704 Corrine Avenue, Memphis, Tennessee, on bill #7810 and #7811, from the Goldman & Company of Little Rock, Arkansas. On the 6th of July, 1950, at Hazen, Arkansas, he stopped a truck, License #2 P7 Z206. This truck was also identified as the Lloyd A. Fry Roofing Company, driven by James A. Mayo. This truck was loaded with 435 bundles of shingles and 25 pails of asphalt, consigned to Dyke Bros., in North Little Rock, Arkansas, on bill #21618 of the Fry Roofing Company. On August 1, 1950, at Highway 70, east of Little Rock, he stopped a truck, license #2 P/7 Z219, driven by J. P. Boshers, identified as Lloyd A. Fry Roofing Company, a shipment consigned to Nobholz Hardware & Building Supplies Co., Conway, Arkansas, bill #21832. On the 3rd day of August, 1950, at DeValls Bluff, Arkansas, he stopped a truck, license #2 P/7 -Z088, driven by Joe Ragland, loaded with merchandise, bill #21845, from the Lloyd A. Fry [fol. 166] Roofing Company, consigned to Ellis Mercantile Co. 4500 Asher Avenue, Little Rock, Arkansas, loaded with asphalt shingles and roofing material. The truck was identified as a Lloyd A. Fry Roofing Company truck. He stopped a truck driven by J. P. Boshers, license #2 P/7 Z219, identified as a Lloyd A. Fry Roofing Company truck,

loaded with asphalt roofing, bill #21906, consigned to the George Hubbard & Son, Hot Springs, Arkansas.

Thereupon said hearing was adjourned and set for further hearing on October 11, 1950.

[fol. 167]. MR. E. J. ELDRIDGE, a witness called on behalf of the plaintiff, having been previously sworn to testify the truth, the whole truth and nothing but the truth, was recalled to the stand and testified on his oath as follows:

Direct examination.

Mr. Elliott:

Q. Mr. Eldridge, you are the witness who was on the stand at the conclusion of the preceding session?

A. Yes, sir.

Q. When you previously testified, you placed in evidence Exhibit #24, being a statement of motor transportation costs, Lloyd A. Fry Roofing Company, Memphis, Tennessee, November 1, 1949, to June 30th, 1950?

A. Yes, sir.

Q. On which was reflected what is referred to as outbound income and inbound income?

A. Yes, sir.

Q. And your explanation of the inbound was—that was an amount reflecting transportation of supplies of materials to the Volney Felt Mill?

A. In part. Part of it was Fry and part of it was Volney. It was inbound for both parties. The inbound freight to which you referred and on that statement—part of that inbound was for Lloyd A. Fry and part of it was for Volney Felt Mills.

The Court: None for the public?

A. (Witness answering) None for the public.

[fol. 168] Mr. Elliott (Continuing):

Q. And the figure \$7,154.24, then, is for Lloyd A. Fry supplies and materials as well as for Volney Felt Mills supplies and materials?

A. That is correct.

Q. On this transportation form for Volney, were there any freight bills issued or invoices rendered to Volney for that transportation?

A. No, sir.

Q. When does your fiscal-year end, Mr. Eldridge?

A. October 31st.

Q. At the end of October, anyway?

A. Yes, sir.

Q. This transportation set-up, I believe, was inaugurated in November or December, 1949?

A. It was inaugurated at the start of the present fiscal year.

Q. And you made reference to some of the bookkeeping charges for this transportation being made against Volney by Fry Roofing Company? As a matter of fact, does Volney, or will Volney during the course of the fiscal year, pay Fry anything whatsoever for this transportation?

A. Nothing whatsoever. It is performed gratis.

Q. Suppose Volney—Volney is a wholly owned subsidiary of Fry Roofing Company?

A. Yes, sir.

Q. With the same officers, directors and employees?

A. That is correct.

[fol. 169] Mr. Elliott: I believe that is all.

Cross-examination.

Mr. Warren:

Q. Mr. Eldridge, Volney Felt Mills and Lloyd A. Fry Roofing Company file separate income tax returns?

A. I imagine they do. I can't testify as to that, though.

Q. That doesn't come in your division?

A. That doesn't come under me.

Q. How many units—tractors and trailers—are used in the Memphis division of the Fry Roofing Company?

A. Well, I can't testify as to the exact number, but I believe there is about 12 or 13 tractors and possibly 18 to 20 trailers, but I think that is in the record.

Mr. Elliott: I might call Your Honor's attention to the fact that the witness Hecht was to submit as an exhibit to his testimony a list of the equipment currently being used, and that has been done—that was equipment used, I understand, in Arkansas. I asked him in the division.

Mr. Warren: I want to be fair with this gentleman, but when I have a witness on cross-examination I seriously doubt the propriety of counsel's proceeding to testify, and while I know Your Honor is very liberal with the practice here, I do feel like it is taking a little advantage of me for counsel to come pulling him off the hook. I am not complaining. I am asking in the future will counsel allow the witness to testify.

The Court: The statement has been filed in the record.

Mr. Elliott: It was transmitted to the reporter, with a copy of the letter to counsel for the defendant, and it is of record.

Mr. Warren: That is the statement of Mr. Hecht. Let me inquire at this time, has Mr. Whittington filed his statement—his list? In the Whittington deposition it was agreed that Mr. Whittington would file a list in addition to Mr. Hecht's list. I inquire whether that list may be filed, or whether the list submitted to you by counsel was from Fry Roofing Company, was supposed to cover both witnesses.

Mr. Elliott: The request was made to Mr. Hecht to file one, and a further request was made for Mr. Whittington to file one, and two were filed, one for Mr. Hecht and one for Mr. Whittington. You have a copy of the letter transmitting it, as shown, to the reporter.

Mr. Warren: I have a copy of the letter transmitting one list.

Mr. Elliott: In duplicate.

Mr. Warren: I want the record to show they were the same. Where are they?

Mr. Elliott: There is a letter in the deposition addressed to Mr. Webster, the Court Reporter. Read it to the Court.

Mr. Warren: The exhibit is a one-page exhibit marked [fol. 171] Schedule A. I am inquiring whether or not this is the list of the tractors and trailers as furnished by the list by Mr. Hecht and Mr. Whittington.

Mr. Elliott: That is correct.

Mr. Warren: They both filed identical lists.

Mr. Elliott: Yes, sir, because the equipment is identical.

Mr. Warren: You testified this equipment was identical.

Mr. Elliott: Yes, sir.

Mr. Warren (Continuing):

Q. Mr. Eldridge, you say that there are how many tractors and trailers, to the best of your knowledge, out of the Memphis division?

A. I thought there were 12 tractors and 18 to 20 trailers. Although, that is a guess.

Q. How many states are serviced out of the Memphis division?

A. The State of Tennessee, a small part of Kentucky, a portion of Georgia, a portion of Alabama, and Arkansas. I believe that is all.

Q. Now, the tractors and trailers that were scheduled, that were filed on the list, are they furnished by Mr. Hecht, are they just the trailers and tractors furnished in Arkansas, or used in the whole area?

A. Used in the whole area.

Q. And no other tractors and trailers are used in the area other than those found in Mr. Hecht's list?

[fol. 172] A. None.

Q. Were you present at the deposition of Mr. Whitington?

A. No, sir, I was not.

Q. Mr. Eldridge, do you recall receiving a letter from Mr. Hagarty of the Interstate Commerce Commission of February 16, 1950, in which Mr. Hagarty told you that the Interstate Commerce Commission considered your arrangements as illegal?

A. We may have received one. Of course, we didn't give that any consideration whatsoever because he had no authority to say that it was illegal.

Q. Who is Mr. Hagarty?

A. He is the district manager.

Q. Of what?

A. The Interstate Commerce Commission.

Q. You do remember receiving that letter?

A. I think we received one.

Q. You received it? It was to you directly, wasn't it?

A. I believe so.

Q. And he told you that the Interstate Commerce Commission, after investigation, had determined your operation illegal?

Mr. Elliott: If Your Honor please, that's not proper—

Mr. Warren (Interrupting): This is cross-examination.

The Court: Have you a copy of the letter?

Mr. Warren: I am going to put Mr. Hagarty on as a witness.

The Court: Of course, the best evidence is the letter. [fol. 173] Do you have the letter with you?

A. (Witness answering) No, sir.

The Court: If you remember the exact terms of it, you can state it.

A. (Witness answering). No, I can't remember that.

Mr. Warren (Continuing):

Q. Mr. Eldridge, under this present agreement, isn't it true that your insurance charges are about half your insurance cost for transportation?

Mr. Elliott: About half of what?

The Court: That is what I was going to ask.

Mr. Warren (Continuing):

Q. About half of the cost as if you actually owned all of the equipment?

A. No. As a matter of fact, I think under our present arrangement if we owned all of the equipment it would be even less than that.

Q. It would be less than that?

A. That is correct.

Q. Mr. Eldridge, when did Mr. Whittington abandon his old type of equipment lease and start in with the new type equipment lease he had?

A. I don't know. I have nothing to do with that lease.

Q. You attended a conference on January 26, 1950, at the Public Service Commission in Arkansas, with reference to this type of operation?

A. I don't recall the exact date, but about that time, I imagine.

Q. At the time, Mr. Eldridge, did not furnish the Public [fol. 174] Service Commission with a copy of the old trip lease?

A. I didn't furnish them with a copy of that lease. I never had it. I never did have one.

Q. Did your attorney furnish one?

A. I don't think we had an attorney then.

Q. What was his name—Kossell?

A. He is not an attorney.

Q. Who is he?

A. He is an employee of Whittington.

Q. Was Mr. Wrape there—was he present?

A. No, sir.

Q. You didn't furnish a copy?

A. I gave Mr. Meehan a copy of the contract between Whittington and Lloyd A. Fry.

Q. Mr. Eldridge, are you from the Chicago office?

A. Yes, sir.

Q. Are you familiar with the petition filed by the Lloyd

A. Fry Roofing Company with reference to the lease of equipment with the Gray Brothers, Inc.?

A. Yes, sir.

Q. That petition had attached to it a copy of the old type lease agreement, didn't it?

A. It had a copy of the lease agreement, but that is not the type typical of all.

Q. Wasn't that identical, the old agreement that Whittington had with them?

A. I couldn't testify to that. I don't know anything about Whittington.

[fol. 175] Q. You know about Whittington's old lease.

A. I never have read it fully. I wasn't concerned. I didn't prepare it. I wasn't concerned.

Mr. Warren: I believe that is all.

Re-direct examination.

Mr. Elliott:

Q. Mr. Eldridge, has the Interstate Commerce Commission ever instituted any complaint proceeding against Fry with respect to this Memphis operation?

A. None whatsoever.

Q. Has the Interstate Commerce Commission instructed the Fry Roofing Company to cease and desist from this operation?

A. None whatsoever.

Q. Has the Commission been fully informed with respect to all of the operations at all times?

A. Yes, sir.

Q. Have you been present at conference with the district supervisor, Goodwin, at Memphis?

A. No, sir.

Mr. Elliott: That is all.

Mr. Warren: That is all.

Witness excused.

[fol. 176] Mr. Elliott: If Your Honor please, in order that there may be no mistake, when Mr. Hecht was on the stand previously he agreed to furnish an equipment list of equipment at that time being operated by Fry Roofing Company, and we now offer, in compliance with that agreement, a document which is marked at the top "Schedule A", reflecting trailers and then tractors, by motor numbers, type and owner, to the testimony of Mr. Hecht.

Thereupon, said "Schedule A" was introduced and received into evidence and marked as Exhibit #25 hereto.

Mr. Elliott: Heretofore, if the Court please, we have offered a number of exhibits for identification, and now we offer those exhibits in evidence.

The Court: That is all right.

Mr. Warren: The same objections I made at the time, I will renew that.

The Court: The same objections will be noted.

Mr. Elliott: That, if the Court please, is the plaintiff's case.

Mr. Warren: I would like to offer at this time photo-

static copies of equipment lease that were furnished me this morning by counsel for the plaintiff, the lease of Mr. [fol. 177] Whittington or the Whittington company, Frank E. Whittington, Inc., with the owner-operators of five trucks in turn leased by Whittington to the plaintiff here. One was J. A. Mayo, one from William Lindsey, one A. D. Hollingsworth, one from Oliver Batson, and one with Dick G. Allen.

The Court: They are the operators and owners?

Mr. Warren: That is right.

The Court: And they leased them to Whittington, who in turn leased them to the plaintiff here, and they may be marked.

Thereupon, said photostatic copies of equipment lease agreements were introduced and received into evidence and marked Exhibits #26 through #30, inclusive, hereto.

Mr. Warren: I would like at this time to offer the deposition of Frank E. Whittington, which was taken pursuant to agreement on September 13th, 1950.

The Court: Yes, sir.

Thereupon, said deposition was introduced and received [fol. 178] into evidence and marked as Exhibit #31 hereto.

Mr. WINSTON CHANDLER, a witness called on behalf of the defendant, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct examination.

Mr. Warren:

Q. What is your name?

A. Winston G. Chandler.

Q. Where do you live, Mr. Chandler?

A. 2117 South Fillmore, in Little Rock.

Q. Where are you employed?

A. With the Arkansas Public Service Commission.

Q. For how long have you been employed?

A. Since March 15th, 1949.

Q. What is your official position with the Public Service Commission?

A. I am an enforcement officer.

Q. Of the what?

A. Of the transportation division.

Q. Transportation division?

A. Yes, sir.

[fol. 179] Q. Does the operation of the Lloyd A. Fry Roofing Company and Frank Whittington, Inc., come under the transportation division of the Public Service Commission?

A. Yes, sir.

Q. Are you familiar with the conference rule and order that was entered by the Commission on the 11th of May, 1949, in case #R461, with reference to the legal lease of motor equipment?

A. I am.

Q. As interpreted by the Public Service Commission?

A. I am.

Q. Was it the conference rule and order identified and about which there was much testimony in the plaintiff's part of this case?

A. It is.

Mr. Elliott: Now, if Your Honor please, I want to object—

Mr. Warren (Continuing):

Q. This rule and order was made by the Commission after a conference?

A. Yes, sir.

Q. Is it now in existence?

A. Yes, sir.

Q. As a part of the official records of the Public Service Commission?

A. Yes, sir.

The Court: It is in force at this time?

A. (Witness answering) Yes, sir.

The Court: I don't see— What is the basis of your [fol. 180] objection? If it is not the best evidence, they ought to have the record here. Under their theory, I think the ruling of the State Commission would be admissible.

It might be arbitrary and illegal, but I think it would be admissible. You understand that theory, Mr. Elliott.

Mr. Elliott: On second thought, my theory is based on a technicality. I'll withdraw the objection.

The Court: It will be noted, if you want it.

Mr. Elliott: That is all right.

Mr. Warren: If it is a technicality, I can have the secretary bring down a certified copy of the original.

Thereupon, said conference ruling and order was introduced and received into evidence and marked as Exhibit #32 hereto.

Mr. Warren (Continuing):

Q. Mr. Chandler, are the records of the Public Service Commission with reference to the holders of the certificates of convenience and necessity to operate on the highways of Arkansas, one of your departments?

A. Yes, sir.

Q. Are you one of the supervisors of those records?

[fol. 181] A. Yes, sir.

Q. Have you examined those records to determine whether or not the Lloyd A. Fry Roofing Company holds a certificate of convenience and necessity from the State of Arkansas, either as contract carriers, common carriers or broker, to operate on the highways of Arkansas?

Mr. Tarlowski: We will concede that.

A. (Witness answering) I have checked them, and they do not.

Mr. Warren (Continuing):

Q. Have you examined your records to determine whether or not Frank E. Whittington or Frank Whittington, Inc., holds a certificate of convenience and necessity, either as common carriers or contract carriers or brokers, to operate on the highways of Arkansas?

A. I have checked, and they do not.

Mr. Elliott: We will also concede that neither Frank Whittington nor Frank E. Whittington as an individual has.

Mr. Warren: Well, Your Honor, in view of the fact that

Frank Whittington is not a party to this, and these gentlemen do not represent them, I want to put in the record neither Frank Whittington as an individual or as a corporation has such a certificate, and I would like for him to go ahead and answer the question.

The Court: He answered the question.

Mr. Warren (Continuing):

Q. Neither Frank Whittington, Inc., or as an individual, holds a certificate, according to the records?

A. No, sir, they do not.

[fol. 182] Q. Have you examined the records of A. D. Hollingsworth, Dick G. Allen, Oliver Batson, William R. Lindsey, and J. A. Mayo, to see if they hold such a contract carrier or common carrier or broker's license?

A. They do not.

Q. Have you, in company with a duly authorized peace officer of the State of Arkansas, stopped trucks labeled "Fry Roofing Company" and questioned them—the drivers of the trucks—on the highways of the State of Arkansas?

A. I have.

Q. Do you have a memo of the information of the trucks you have stopped, and drivers' licenses and chauffeurs' licenses, and the number of the trucks?

A. Yes, sir.

Q. Will you refer to this memorandum and records, and tell us the number of instances where you have stopped those trucks, and the drivers of the trucks, and information you have received?

Mr. Elliott: If the Court please, that is already in the record once. We put it in by stipulation. I have no objection to that.

Mr. Warren: We put in there the license numbers and the make of truck, and all of that information.

The Court: Do you have some kind of information—new information—that was not in the record?

Mr. Elliott: Mr. Chandler, read from the record.

The Court: Didn't you read from that record to the reporter?

[fol. 183] A. (Witness answering) "If I remember correctly, I gave the place and the driver's name and place I stopped them, and the drivers, but I didn't give the details of the investigation.

Mr. Elliott: That is a difference of opinion.

The Court: Go ahead and put it in.

Mr. Warren: I think the record would be incomplete without it.

Mr. Warren (Continuing):

Q. All right, Mr. Chandler. Will you proceed, Mr. Chandler, to give us the first instance where you stopped a truck labeled "Fry Roofing Company" or "Lloyd A. Fry Roofing Company"?

A. On the 29th day of November, 1949, at Carlisle, Arkansas, I stopped a truck, GMC truck, Tennessee license #2 P/7 Z254, driven by J. P. Boshers, who stated that he was the owner of the vehicle.

Mr. Elliott: Now, if Your Honor please, we object to any statements by any alleged drivers.

Mr. Warren: Your Honor, this is information listed by an official of the State of Arkansas, making his investigation.

Mr. Elliott: That doesn't render it competent, simply because he was an official of the State.

The Court: I think if the driver made a voluntary statement about it, without any coercion, his statement may have subjected him, if there are criminal proceedings pending against him, but if anyone who is arrested for any kind of violation makes a voluntary statement, his statement was obtained without any authority of threat or promise?

A. (Witness answering) Yes, sir.

[fol. 184] The Court: I believe it would be admissible.

Mr. Elliott: The statement to which the Court refers—usually are written statements, and the man, of course, is not a party to this litigation.

The Court: All right.

Mr. Elliott: Whether it is binding on the Fry Roofing Company, whether he had authority to make any state-

ments has not been established, and that is the basis of our objection.

The Court: Well, it's admitted that this man, according to Whittington's deposition, owned the truck and drives it.

Mr. Warren: No, sir.

The Court: I thought he was one of the boys.

Mr. Warren: He is one of the boys. He was not listed.

Mr. Elliott: If he is not listed, it is because he is no longer employed by Fry or wasn't employed at the time the deposition was taken or Mr. Hecht's exhibit was prepared.

Mr. Warren: We don't know. Let me point out for the record, in fairness here, Lloyd A. Fry Roofing Company is doing business in Arkansas. It has its office in Memphis. It is outside the jurisdiction of the Public Service Commission. So is Frank Whittington, and Whittington has testified in his deposition he won't come in here because no one would offer him immunity from arrest. These drivers are outside the jurisdiction of the only way we can bring them in. They objected strenuously having them over here as witnesses. The only thing that is available to the State is to make an investigation and take state-
[fol. 185] ments from people that are driving these trucks for Lloyd A. Fry Roofing Company. This is an injunction against a criminal prosecution and is the only means that is available to us. We think it is an investigation of a duly authorized officer of an official State agency bringing about the arrests that were made, and, after all, that is the only purpose of the injunction, to stop the arrests.

The Court: Did you take a written statement from one of these men?

A. (Witness answering) I think from one of them.

The Court: The purpose was not to take a written statement.

A. (Witness answering) I just had my notebook out there, and took the statement out in this investigation at the time I made the investigation as to what the drivers' statements are, and I go then and type them up in the office.

Mr. Warren: We are showing they weren't harassing Lloyd A. Fry Roofing Company. If he had put them under oath and so shown, we are following an unusual procedure. This is the usual procedure taken in stopping any truck?

A. (Witness answering) Yes, sir.

Mr. Warren: We have been charged here with harassing them and persecuting them.

The Court: Of course, if they don't have to have a certificate— Let's let the statement in for whatever it's worth, and of course any of these drivers that are available, you can take their deposition. Chances are, what [fol. 186] Mr. Chandler is testifying to is correct. He had no personal interest in it as an official enforcement officer.

Mr. Warren: We don't want to ask the postponement of this hearing, because that works against the interest of the State. They every day are violating the law of this State. This list was taken on September 13th, and we didn't get this list until last Saturday at noon. We had no chance to investigate any of this information. We don't think it is material, because it is a technical question of law.

The Court: We are admitting Mr. Chandler's testimony.

Mr. Elliott: If Your Honor please, may it be understood we are making objections to all statements made by—all alleged statements made by the alleged drivers, on the ground that it has not been established that any statement made by any driver was authorized by Fry, other than that he made the statements within the scope of his authority.

The Court: That will be noted of record.

Mr. Elliott: And we note our exceptions to the admission of the testimony.

Mr. Warren (Continuing):

Q. Go ahead, Mr. Chandler.

A. (Witness answering) This truck was empty at that time, and was returning from a trip to Fort Smith. He hauled a load of 400 bundles of shingles consigned to the Mid-West Lumber & Supply Company at Fort Smith. I asked for a copy of a lease between Mr. Boschers and Whittington. He told me he was leased to Whittington and was

[fol. 187] driving for Fry Roofing Company. He pulled out a copy of a lease and handed me, and I have checked the lease, and it was a lease between the Whittington company and the Fry Roofing Company, not the lease between the lessor and the lessee.

Mr. Warren: You mean Boshers and Whittington?

A. (Witness answering) That is right, the original lessor. I asked him about a copy of that lease, and he said he didn't have one. They give him that copy of that lease and told him that is all he would need. I told him to try to get one before he came over here again. In the meantime, we went up to Mr. Boshers, and he called—and he went to the telephone and he called for Mr. Whittington, if I remember correctly. He couldn't be reached at that time, and they got hold of Jim Wrape, the attorney for Fry Roofing Company, and talked to him, and a \$100 bond was asked for at that time.

Q. A charge was placed against him for operating without a certificate?

A: Yes, sir.

Q. All right. Go ahead.

A. And the court was set in Carlisle.

Q. The case hasn't been disposed of?

A. That one has.

Mr. Tarlowski: That is pending on appeal in Lonoke County, but there was no trial held.

A. (Witness answering) Before Justice Long for trial over there. On the 2nd day of December, 1949, at 10:00 a. m., it was continued until the 7th day of December, 1949, [fol. 188] when the bond was forfeited—\$100. No one appeared at the trial.

Mr. Warren (Continuing):

Q. That case is on appeal?

A. Yes, sir.

Q. All right. Is that your first incident? What is your second incident?

A. I believe it is May 2nd, 1950, I stopped a truck that had Fry Roofing Company lettering on the side, driven by

Joe H. Ragland of Memphis, Tennessee. He had a load on-going consigned to Fones Bros. Hardware Company of Little Rock, Arkansas. He stated to me that he owned the truck and had leased it to Mr. Whittington approximately five weeks before that date. I asked him, in my investigation I usually try to find out how they go about the operation and how they made their contacts, and I asked him how he happened to lease to Mr. Whittington, and he stated he heard Mr. Whittington was leasing trucks.

Mr. Elliott: If you Honor please, that is objectionable.

The Court: I don't think that would be admissible. That would be purely hearsay—anything that he did.

Mr. Warren. (Continuing):

Q. Did you receive that information?

A. I received information that he was leasing trucks.

Mr. Elliott: Certainly anything between this man and parties to this litigation would be binding on Fry Roofing Company.

Mr. Warren: Whether or not parties—as a party to the litigation in name, certainly he is a participant, in a big way.

[fol. 189] The Court: I think that. Did he testify that he leased the truck to Whittington?

A. (Witness answering) Yes, sir, that is what he was getting around to.

The Court: Yes, sir, I think that is right. Whittington is not a party, but under their theory, of course, he is the go-between to get out of paying this thing, and of course he is an interested party, because he is leasing these trucks to Fry.

Mr. Elliott: We concede he has an interest in the litigation, of course.

The Court: Yes, sir, he is bound to. He released them, really, and—releases them to Fry and hires the driver, who is the owner. He did state that he had a lease between him and Whittington?

A. (Witness answering) Yes, sir, he stated that he went to Memphis and contacted Mr. Whittington and told him he

would like to lease a truck to him. Mr. Whittington told him to go to the Fry Roofing Company and get a job as driving and he would lease his truck. And, according to Ragland's statement to me, he went to the Fry Roofing Company office, and he said they acted like they expected him to come. They told him they knew he was coming, and they would put him to work, and he started in filling out his proper papers for medical examination, and so forth, to start driving. He went back and signed the lease with Mr. Whittington.

Mr. Warren (Continuing):

Q. He became an employee of Fry Roofing Company and [fol. 190] signed a lease to Whittington?

A. Yes, sir, that is right.

Q. What was the date?

A. The date of that lease, or when I stopped him?

Q. Stopped him.

A. May 2nd, 1950.

Q. What is your third incident?

A. On June 6th—just a moment. On June 14th, 1950, on Highway 70, just out east of North Little Rock here, I stopped a truck with a Lloyd A. Fry Roofing Company on the license #2 P/7-Z203. That is a Tennessee license. An International truck loaded with asphalt and roofing consigned to the Fones Bros., Little Rock, Arkansas, from the Lloyd A. Fry Roofing Company, Memphis, Tennessee. The driver of this truck was Knox R. Boshers.

Q. Is that a different Boshers?

A. Yes, sir. He stated he was a brother to the other man. I couldn't get anything out of him, much. He wouldn't talk.

Q. What was the license number—the Tennessee license?

A. Tennessee license, yes, sir.

Q. Are all of these Tennessee licenses?

A. Yes, sir.

Q. Are any of them Arkansas licenses?

A. No, sir.

Mr. Tarlowski: Was he arrested at that time?

A. (Witness answering) No, he wasn't arrested.

Mr. Tarlowski: Was Ragland arrested at the time he was stopped?

[fol. 191] A. Yes, Ragland—back to the other case, #2—Joe H. Ragland was arrested, supposed to put up a \$500 bond, which bond was guaranteed by Mr. Jim Wrape at Memphis. The charge was a violation of the Motor Carriers Act 367 of 1941, and he was summonsed to appear before Justice Larry Church at DeValls Bluff, at 5-11-50, at 11 a. m. That case was continued on that date.

Q. Do you have another incident?

A. Here is one: This is on January 24th, 1950, at DeValls Bluff. I stopped a truck with the Lloyd A. Fry Roofing Company identification on it, driven by Dick Allen.

Q. Is that Dick G. Allen?

A. Yes, sir, it is. Dick is the way I have it on this, but it is the same party. Truck license #2 P/7 Z261. That is a Mack truck. This truck was owned by Mr. Allen, according to his statement to me, and he leased it to Frank E. Whittington and got a job driving the truck, his truck, for the Lloyd A. Fry Roofing Company, which he was driving at that time.

Q. Was a charge filed against him?

A. He was charged with violation of Act 367 of 1941, the Motor Carriers Act, and put under a \$100 cash appearance bond.

Q. Is the case still pending?

A. That case is still pending; was supposed to be tried by Justice Church at DeValls Bluff.

Q. Still pending the outcome of this litigation?

A. Yes, sir. I would like to state on all of those summonses Frank E. Whittington and the driver were both named.

Q. Frank E. Whittington was charged?

[fol. 192] A. Yes, sir.

Q. Have you ever been able to serve Mr. Whittington for warrants for arrest?

A. I have not.

Q. How many warrants are outstanding for him?

A. Three—on the same dates, that is, the 24th of January, 1950, at DeValls Bluff, I stopped a truck identified with

the Lloyd A. Fry Roofing Company identification, driven by M. L. Pate, loaded with roofing going from Memphis to Little Rock.

Q. Was he on this list?

A. I don't believe he was. No. The license of this truck was 2 P/7 Z266, International truck. This truck was leased to Frank E. Whittington by M. L. Pate and was owned by M. L. Pate, according to his statement to me, and he secured a job from the Fry Roofing Company to drive his own truck when it was in turn sub-leased from Whittington to Fry Roofing.

Q. The same procedure?

A. Yes, sir. He was summonsed into court on February 1st, 1950, at 10 a. m.

Q. What disposition has been made of his case?

A. That case was continued and is still pending.

Q. Was Frank E. Whittington charged on this?

A. Whittington was charged on all cases.

Q. What is your next one?

A. On June 14th—wait a minute, I had that one. On June 26th, 1950, I stopped a truck driven by Wallace P. Wasson, whose home is Milan, Tennessee.

[fol. 193] Q. Was he on the list?

A. No, sir. He had chauffeur's license #712315A, Tennessee. An International truck, license #2 P/7 Z202, Tennessee license for that. He was loaded with asphalt and shingles and baled paper, Fry Roofing bill #21541, consigned to Long-Bell Lumber Company in Little Rock from the Lloyd A. Fry Roofing Company. The driver stated that he owns this truck and it has been leased to Whittington for approximately one month from that date. On that afternoon of the same date, June 26th—

Mr. Elliott (Interrupting): Was that man arrested?

A. (Witness answering) No, he wasn't arrested.

Mr. Warren (Continuing):

Q. Go ahead.

A. On June 26th, the same date, I stopped the same truck on a return haul at DeValls Bluff. He was loaded with 20 bales of mixed paper on bill #7810 and 7811 from the Gold-

man & Company in Little Rock, and consigned to the Volney Felt Mill, 704 Corrine Avenue, Memphis, Tennessee.

Q. Mr. Chandler, that was after the temporary restraining order was signed by the Court?

A. Yes, sir.

Q. Since that time, none of these men have been arrested?

A. Yes, sir, that is right. That is the reason they haven't been arrested, on account of that restraining order. This truck, as I stated before, was owned by Wallace P. Wasson, and it was owned by him, by his own statement, and this paper was picked up here in Little Rock on a return haul, being hauled to Memphis.

[fol. 194] Q. The Volney Felt Mill?

A. Yes, sir.

Q. What is your next one?

A. I asked him if he would sign a statement voluntarily as to the operation, and he did sign a statement.

Q. Do you have that statement?

A. It is in some of my files.

Q. Was it a mere statement that he owned the truck and it was leased?

A. I can read the signed statement by him, and I think I left that over there in your files—on the back, I believe.

Mr. Tarlowski: I have no objection to it being read.

Mr. Warren (Continuing):

Q. Will you read that into the record?

Mr. Elliott: Yes, I have a general objection.

Mr. Warren: Other than the general objection?

A. (Witness answering) The statement is 6-26-50 at DeValls Bluff, at 2:43 p. m., and reads as follows: "I picked up a load of baled paper #7810, #7811, from Goldman and Co., Little Rock, Arkansas, dated June 26, 1950, sold to Volney Felt Mill, 704 Corrine Avenue, Memphis, Tennessee, to be delivered to above address. I am driving truck for and I am being paid by Fry Roofing Company, Memphis, for this trip."

Mr. Warren (Continuing):

Q. What is the name?

A. Signed by W. P. Wasson, is the way he signed it.

The Court: Did it have the roofing company sign on the side of the truck?

[fol. 195] A. Yes, sir, the Lloyd A. Fry Roofing Company.

Mr. Warren (Continuing):

Q. Did he have a copy of the invoice?

A. Yes, sir.

Q. Did he furnish a copy of the invoice?

A. Yes, sir.

Q. Who does the invoice show the material was sold to?

A. The Volney Felt Mill, Memphis, Tennessee.

Q. That was in a Fry Roofing Company truck?

A. Yes, sir, that is right.

Mr. Warren: I offer that copy of invoice and ask that it be received as an exhibit.

Thereupon said bill of the Goldman & Company was introduced and received into evidence and marked as Exhibit #33 hereto.

Mr. Warren (Continuing):

Q. Go ahead.

A. On the 6th day of July, 1950, at 11 a. m. at Hazen, Arkansas, I stopped a truck, unit #107, Tennessee license 2 P/7-Z206, identified as Lloyd A. Fry Roofing Company on the side of the truck, driven by Joe Adams Mayo. The address was Memphis, Tennessee. This truck was [fol. 196] loaded with bundles of shingles and pails of asphalt consigned to Dyke Brothers in North Little Rock, from the Lloyd A. Fry Roofing Company. That was bill #21618, dated June 6, 1950. That was a Fry Roofing Company bill. Mayo stated he was the owner of this truck and that it had been leased to Frank E. Whittington since November, 1949. He stated he received 9c per mile for the use of the tractor from Frank E. Whittington and also received 5½c a mile for driving the vehicle for the Fry Roofing Company. He stated he did not sign a lease with Whittington. He had a verbal agreement

with Whittington; no lease signed. On the same date, July 6th, 1950, on return haul of this truck going from Little Rock back to Memphis, I stopped the same truck, 2 P/7 Z206, operated by Lloyd A. Fry Roofing Company and driven by Joe Adams Mayo. This truck was loaded with 18 bales of paper consigned to the Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., Memphis, Tennessee, Bill #7827 and 7828, from the Goldman & Company in Little Rock. On August 1st, 1950, on Highway 70 I stopped a truck identified as a Fry Roofing Company truck, loaded with 413 bundles of shingles, 29,190 pounds, and 10 rolls of asphalt roofing at 900 pounds weight, consigned to the Nobholz Hardware & Building Supplies at Conway, bill #21832, dated 7-31-50, from the Lloyd A. Fry Roofing Company. It was an International truck driven by J. P. Boschers of Memphis, Tennessee, license #2 P/7 Z219. August 3rd, 1950, at DeValls Bluff, I stopped a truck identified as a Lloyd A. Fry Roofing Company truck, license #Tennessee 2 P/7 Z088, driven by Joe Ragland, merchandise bill #21845, consigned to Ellis Mercantile Company, 4500 Asher Avenue, Little Rock, [fol. 197] Arkansas. Ragland stated that he had owned the truck and leased it to Whittington, who in turn leased it to Lloyd A. Fry Roofing Company. He stated to me he would be loaded with a load of paper approximately 22,000 pounds, returning that day, consigned to the Volney Felt Mill, Memphis, billing on the return haul. I didn't stop him on the return haul.

Q. That is all of them?

A. I have one more

Q. Go ahead.

A. On August 10, 1950, at DeValls Bluff, I stopped an International truck identified as a Lloyd A. Fry Roofing Company truck, license #2 P/7 Z219, driven by J. P. Boschers, loaded with merchandise from the Lloyd A. Fry Roofing Company, bill #21906, dated 8-9-50. This roofing was consigned to George Hubbard & Son, Hot Springs, from the Lloyd A. Fry Roofing Company.

Q. That is all of them?

A. That is all of them.

Mr. Warren: I believe that is all.

Cross-examination.

Mr. Elliott:

Q. Mr. Chandler, you were present in Memphis when the deposition of Mr. Whittington was taken?

A. I was.

[fol. 198] Q. And in his deposition he gave you the names of the five people from whom he was renting equipment or leasing equipment at that time, and were employed by Fry Roofing Company?

A. If I remember correctly, he only gave us four names. He stated he couldn't remember the other one. He kind of evaded.

Q. At least the deposition will speak for itself?

A. That is right.

Q. You have mentioned several different tractors and described them in detail as being driven by men who are not now employed by the Fry Roofing Company. I will ask you to examine this Exhibit 25 and see whether or not you recognize any equipment that you stopped other than that of Mayo, whose name is on there—that is, equipment other than for the men reflected as being owned by the names of the men on the exhibit.

A. I would like to state that due to the way the exhibit is fixed, there is no way of checking it, because I don't take the motor numbers, and when I stop the trucks I get the license number and his license, and the motor number is not given.

Q. The model number and make is given.

A. On our summonses we just—if it's an International, I put it down. We don't put the model number down. We get the license number for identification.

Q. Now, I believe you say that when you stopped Mr. Mayo, Joe Mayo, it was on July 6, 1950?

A. That is right.

Q. You made the statement he said he had no written contract with Whittington.

[fol. 199] A. That is the statement he made to me.

Q. I hand you what has been filed by the State as its Exhibit #26, Mr. Chandler, and ask you if that is not a

written contract executed between Mayo and Whittington on the 1st day of March, 1950?

Mr. Warren: Your Honor, that speaks for itself.

A. (Witness answering) What did you want me to answer?

Mr. Elliott (Continuing):

Q. Doesn't that exhibit indicate it was executed on March 1st, 1950, between Whittington and Joe Mayo?

A. On the photostat it states—

Q. (Interrupting) You were present when your counsel asked for photostats?

A. Yes, sir.

Q. It also indicates it was witnessed by Mr. S. E. White, doesn't it?

A. I believe that is the name down there, yes.

Q. Had you not been restrained by this Court, you would have continued to arrest these drivers every time you stopped them?

A. Where I found a violation of the law it was my duty to arrest them.

Q. If the driver told you he owned the equipment which he had leased to Whittington and that he was employed by Fry Roofing Company, then you would have arrested him?

A. Well, I suppose so.

Q. And you will resume those arrests if this injunction or restraining order is not made permanent?

[fol. 200] A. My job is to keep them from operating illegally on the highways until they get a permit to operate.

Q. All of these men told you that they were employed by Fry Roofing Company and were being paid by Fry Roofing Company?

A. They all told me they were being paid by Fry Roofing Company at 5½¢ a mile.

Q. You identified the material being transported in each instance as the property of Fry Roofing Company?

A. Other than the hauls to the Volney Pelt Mills.

Q. That would be the back haul?

A. That is right, on the back haul.

Q. You didn't make any arrests based on the transportation of material to Volney?

A. I didn't because the restraining order was in effect at that time.

The Court: I didn't get that answer.

A. (Witness continuing) Because the restraining order was in effect at that time, from this Court, is the only reason I didn't.

Mr. Elliott (Continuing):

Q. You would have arrested them except for the restraining order?

A. I suppose so.

Q. In each instance where you inquired of the driver with respect to a lease, he exhibited to you a copy of a lease between Whittington and the Fry Roofing Company?

A. That is right. The boys told me that they didn't have a copy of the lease between Whittington and themselves. They couldn't get a copy of it.

[fol. 201] Q. Well, now.

A. I have checked all of the trucks, I guess, that ever come into the State, and I never find a copy on the truck, and according to the rules and regulations any leased truck is supposed to have a copy in the truck so it can be investigated.

Q. I believe you said each truck did have a copy of the lease between Whittington and the Fry Roofing Company?

A. That is right.

Q. And each of these trucks was painted and lettered on the side with the lettering indicating operation by the Fry Roofing Company?

A. Yes, sir.

Q. The delivery tickets covering merchandise in the trucks were the delivery tickets of the Fry Roofing Company?

A. With the exception of the one with Volney Felt Mill.

Q. With the exception of the Volney Felt Mill. Did you check with the Tennessee authorities to see whether or not those trucks were actually registered and licensed in the name of Fry Roofing Company?

Mr. Warren: Your Honor, I want to object to such a question. I want to point out in my objection that Mr.

Whittington agreed to furnish us with license numbers in the deposition. The license numbers were not furnished. You leased to the Fry Roofing Company. We want them to note on this list. We got this list Saturday at noon. We haven't had an opportunity, as I said—time runs against us, because so long as they can hold us up by an injunction, they can operate. Mr. Chandler was in bed Monday and [fol. 202] Tuesday and down here in this case today.

The Court: Your answer is that you have not checked with the Tennessee authorities?

A. (Witness answering) I would like to make a statement on the registration of Tennessee. Under their law, you can lease a truck or borrow a truck for ten days and license the truck in any name.

The Court: State that again.

A. (Witness answering) The Tennessee license law is so lax I can go and lease a truck or borrow a truck and license it and lease it to anybody in Tennessee, in any name; even though it isn't my truck.

Mr. Elliott: We object to the interpretation of the Tennessee law.

Mr. Warren: Isn't it true that tractors and trailers are all in the licenses and name of the Fry Roofing Company?

Mr. Elliott: That is my understanding.

Mr. Warren: Regardless of who owns them, they are all licensed in the name of the Fry Roofing Company?

Mr. Elliott: Because they are in the control and possession of the Fry Roofing Company.

Mr. Warren: Can we stipulate that? It was our understanding—

Mr. Elliott (Interrupting): That they were licensed in the name of the Fry Roofing Company, yes, sir.

Mr. Warren: The Fry Roofing Company takes the license out on them?

[fol. 203] Mr. Elliott: Yes, sir, and I want to say, counsel; it was an oversight on my part that the license numbers weren't given.

Mr. Warren: We didn't ask for them in the case of Mr. Hecht; we did ask for them in the case of Mr. Whittington. That is the reason we couldn't understand the two lists being the same.

Mr. Elliott: I frankly haven't read Whittington's deposition, and when the list came in, I promptly mailed it to the reporter and to you immediately. Do you still wish the license numbers filed? We will be glad to procure them and furnish them.

Mr. Warren: Yes. How long would it be—

Mr. Elliott (Interrupting): As soon as I can get back—one day from the time I get back they will be in the mail.

Mr. Warren: When we get the information, we can go ahead. We want to get it up as soon as we can, and not postpone it.

Mr. Elliott: I am offering to get it in the mail within one day, and I assume a simple letter to the reporter will suffice.

Mr. Warren: Oh, yes.

Mr. Elliott (Continuing):

Q. Did I understand you to say, Mr. Chandier, that in no instance has service of process or service of the outstanding warrants been perfected on Whittington?

A. No, they haven't been served on Whittington. They [fol. 204] have been served on the drivers. Whittington couldn't be reached.

Q. Don't you know that he voluntarily came to West Memphis, Arkansas, at your request, one night and stayed with you over there until three o'clock in the morning?

A. Well, he came over there. I had the warrants. We went to try to find a judge to make bond, and we couldn't find him. That is when the Cotton Carnival was in session, and all of the judges in West Memphis were over there, and we stayed there until 1:30 or two o'clock, and Mr. Whittington—instead of keeping him all night or putting him in jail, he promised me if I would let him go he would come back at ten o'clock the next day and make bond, and he refused to come back the next day. I just let him go on his word of honor and gentleman that he would return.

Q. Previous to that you stopped another one of the Fry trucks in West Memphis you didn't mention?

A. Which one was that—which truck are you talking about?

Q. I am talking about the truck you stopped when you

called Mr. Whittington to come over there to West Memphis and he came.

A. That truck was driven by Knox Boshers.

Q. And what was the date on that one?

A. I don't recall the date, the exact date on that.

Q. Was that the time you told Boshers it was going to cost \$500 every time he had been in Arkansas with one of Fry Roofing Company's trucks?

A. I didn't make that statement.

Q. Was it the time you were going to break Frank Whittington?

A. I didn't make that statement.

[fol. 205] Q. You didn't make a statement anything like that to Mr. Boshers?

A. No, sir.

Q. Or any of these other people?

A. No, sir.

Mr. Elliott: I believe that is all.

Re-direct examination.

Mr. Warren:

Q. Mr. Chandler, under the rules and regulations of the Public Service Commission of the State of Arkansas, is it not a requirement on all leased vehicles that copies of the lease be in the truck?

A. I believe that is the rule of the Interstate Commerce Commission. We made an investigation—

Mr. Elliott (Interrupting): I am making an objection. Wait a moment.

The Court: The law would be the best thing, and if that is the law—

Mr. Warren (Interrupting): The law gives the Commission the right to enact rules and regulations for the enforcement of this law. I am asking if that is one of the regulations duly promulgated—

The Court (Interrupting): Do you have a copy of the printed regulations?

[fol. 206] - Mr. Warren (Continuing):

Q. Do you have a copy of the regulations?

A. No, I don't.

The Court: They wouldn't make a regulation without printing it.

A. (Witness answering) They have told us to check them. They are supposed to carry the lease. That is a rule of the Interstate Commerce Commission.

The Court: The testimony of this witness couldn't be the best evidence of the rules.

Mr. Warren: If he was familiar with the rules, if he required it?

The Court: They are bound to have any rule they make.

Mr. Warren: Any rule or regulation would be official. I would refer to it in a brief. He made the statement, and I was trying to check up on it.

The Court: He said all of them had a copy of the lease between Whittington and Fry Roofing Company.

A. (Witness answering) They all had a copy between Whittington and the Fry Roofing Company.

Mr. Warren (Continuing):

Q. Whittington and Fry, but not between Fry and the owners.

A. No, sir. We couldn't ever get a copy of the leases between the original lessor and Whittington.

Q. Have you ever been able to get hold of a copy between Whittington and the lessor?

[fol. 207] A. They had copies at the Public Service Commission at the conference.

Q. Who furnished you with that copy of the leases at the conference?

A. One of Frank E. Whittington's men. He was with us in the conference, or something.

Q. Who was present at the conference?

A. Mr. Eldridge and Hagarty of the ICC and Mr. Meehan.

The Court: Of course, you saw these copies there?

A. (Witness answering) It was not the lease itself.

Mr. Warren (Continuing):

Q. Was the lease furnished you at the conference?

A. No, it was not.

Q. The copies here were between the drivers?

A. Was not.

Q. That has been introduced as exhibits—the photostatic copies?

A. No, sir, there was quite a bit of difference.

Q. Quite a bit of difference? Do you recall who furnished that lease? Was it Mr. Tarlowski?

A. No, sir. I have forgotten his name. It was called here once this morning.

Q. Mr. Kossell?

A. Yes, sir. Mr. Kossell is the one that furnished it.

Q. That was a blank copy of the lease?

A. Yes, sir, and he said that was a copy of the lease as they were using it.

Q. Is this the instrument furnished you as purporting to be the lease or a copy of a lease—the form of a lease—[fol. 208] between Whittington and the drivers?

A. Looking over it briefly, I believe it is, because here is one provision I know was in that lease, where it referred to the driver-owner.

Q. You read it over and you can identify it as a copy at this time?

The Court: Who is Kossell?

Mr. Warren: It was turned over to me in my file.

The Court: Who is Kossell?

A. (Witness answering) He was a representative at the conference held on January 26, 1950, between Mr. Eldridge, the general traffic manager of the Lloyd A. Fry Roofing Company, and Charles Meehan and Winston Chandler, enforcement officer of the Arkansas Public Service Commission, and Mr. Kossell, who was representing Whittington, and Mr. Frank Whittington himself was present, and Mr. R. K. Hagarty, District Director of the Interstate Commerce Commission, with reference to this particular matter.

Mr. Elliott: I think we are unnecessarily cluttering up the record. The State has taken Mr. Whittington's deposi-

tion and has filed it. In his deposition they exhibited to him a copy of a contract and asked him if that wasn't the contract that he at one time had from these people from whom he leased equipment, and he answered it in the affirmative, and the copy is filed attached to the deposition, and then he further testified during the early part of 1950 that form was abandoned and this form, which is reflected by exhibits now in evidence, being photostats of the signed agreement, was substituted for the earlier form, the five [fol. 209] being the five people from whom Whittington now leases equipment, are dated, in the case of A. D. Hollingsworth, February 27th, 1950; in the case of J. A. Mayo, March 1st, 1950; and in the case of Dick G. Allen, March 1st, 1950; and in the case of William R. Lindsey, April 3rd, 1950; and in the case of Oliver Batson, June 26, 1950.

Mr. Warren (Continuing):

Q. Mr. Chandler, have you identified the agreement which I just handed you?

A. Yes, sir, I have.

Q. Is that identical with agreement that is Exhibit 1 of Mr. Frank E. Whittington?

A. Yes, it is.

Q. It is identical?

A. Yes, sir.

Q. And that was furnished as being in existence January 26th, 1950?

A. Yes, sir, it was.

Mr. Warren: That is all.

Recross-examination.

Mr. Elliott:

Q. You say you never were able to get a signed copy of the lease between Whittington and the owner of the equipment?

A. Yes, sir.

[fol. 210] Q. You were present when Whittington's deposition was taken in Memphis?

A. That is right.

Q. At which time he was requested to furnish photostatic copies of the leases now in existence?

A. That is right.

Q. That is all he was requested to furnish, wasn't it?

A. Whatever was in existence. I don't remember how that question was stated to him.

Q. You have, and have examined, the photostats of five signed leases, haven't you?

A. We have five signed leases.

Q. You have examined them?

A. Yes, sir.

Q. You did it before you took the witness stand?

A. Yes, sir.

Re-direct examination.

Mr. Warren:

Q. The leases you have examined are not the leases, they don't contain the same material as the lease presented to the Public Service Commission at the conference?

A. They do not, because that lease stated that the driver-owner would first be able to obtain and retain employment [fol. 211] with the Fry Roofing Company to drive their own truck.

Recross-examination.

Mr. Elliott:

Q. That was in January, 1950?

A. That is right.

Witness excused.

Mr. REUBEN K. HAGARTY, a witness called on behalf of the defendant, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct examination.

Mr. Warren:

Q. Where do you live, Mr. Hagarty?

A. Little Rock, Arkansas.

Q. In what business or profession are you engaged, sir?

A. I am District Director of the Bureau of Motor Carriers, located at Little Rock, Arkansas.

[fol. 212] Q. Under the Interstate Commerce Commission?

A. Yes, sir.

Q. Mr. Hagarty, would you state briefly what your duties are with respect to the motor carriers?

Mr. Elliott: May I ask the witness a preliminary question?

The Court: Yes.

Mr. Elliott: Mr. Hagarty, you are employed by the Interstate Commerce Commission?

A. (Witness answering) Yes, sir.

Mr. Elliott: And your duties are the enforcement of the Interstate Commerce Act as passed by Congress, insofar as it is related to motor carriers?

A. (Witness answering) That and other duties. I have the general supervision of the Commission's orders and directions in the area in which I serve.

Mr. Elliott: That is the United States Interstate Commerce Commission?

A. (Witness answering) Yes, sir.

Mr. Elliott: You have no function and no duties with respect to the supervision of enforcement or the enforcement of the Arkansas Motor Carriers Act?

A. (Witness answering) That is right.

Mr. Warren: Mr. Elliott, that is cross-examination. What is the purpose of that?

The Court: I imagine the questions are being asked with a view to objecting to his testifying.

[fol. 213] Mr. Elliott: Absolutely.

The Court: He is asking what his duties were.

Mr. Warren: I just asked him that question before we started into this leading cross-examination. I want to object to it.

The Court: It is all right. Go ahead.

Mr. Warren: And I save my exceptions.

Mr. Elliott: And you are not a member of the Arkansas Public Service Commission?

A. (Witness answering) I am not.

Mr. Elliott: And have no function and no duties in connection with the enforcement or procuring enforcement of the Arkansas Motor Carriers Act?

A. (Witness answering) That is right. May I make a statement, Your Honor?

The Court: Yes.

A. (Witness continuing) Section 222D of the Interstate Commerce Act, part 2, prevents testimony being given except by order of the Court or by direction of the Commission. I wish to state to the Court I have authority to testify here, from my superiors in Washington, from the Commission.

Mr. Elliott: If Your Honor please, this action is brought to enjoin alleged actions of representatives of the State of Arkansas in enforcement of the Arkansas Motor Carriers Act, being Act 367 of the Acts of 1941. It does not involve any alleged violations or interpretations of the Federal Interstate Commerce Act.

[fol. 214] The Court: That is correct.

Mr. Elliott: And the testimony of this witness, therefore, not being a representative of the State, having no functions or duties in connection with the enforcement of the State statutes, cannot be informative to the Court. Anything he might say is incompetent, irrelevant and immaterial insofar as the State Legislature is concerned, and that is all that is involved in this litigation.

Mr. Warren: Now, Your Honor, let me put in the record here a statement on giving our views, before Your Honor passes on it, sir.

The Court: Yes.

Mr. Warren (Continuing):

Q. Paragraph VII of the plaintiff's complaint states that except insofar as qualifications and maximum hours of service of employees and safety of operation or standards of equipment are concerned the United States Government has not attempted to regulate, supervise or control the operations of private carriers, and with all regulations and requirements of the United States Government complainant has been and is in full compliance. We didn't put this in the record, and we have an opportunity to answer it. Mr. Whittington testified that he was in compliance with the Interstate Commerce Commission.

Mr. Elliott: Hours of service and safety rules?

Mr. Warren: And with all safety rules and rules of the United States. Now, it may be inadvertently put in there. I think it was in there that the Interstate Commerce Commission [fol 215] mission approved this.

Mr. Elliott: It was put in there to reflect the situation exactly as it exists.

The Court: Under our practice, he has the right to put it in the record. Cases go up de novo on appeal, and he may present any testimony, whether the Court regards it competent or not. We let testimony go in, and then if we hold it incompetent it will still be part of the record for the appellate court to pass on.

Mr. Elliott: Our general exceptions will be noted.

Mr. Warren (Continuing):

Q. Now, will you answer that question: What, in brief and in general, are your duties here?

A. I am the chief officer for the Bureau of Motor Carriers, which is known as District H, comprising the states of Arkansas, Louisiana and Oklahoma. Any administration duties require general supervision of the Commission's employees in the field, and they are to advise, direct and investigate to the point of preparing cases for recommendation to the Commission as to the legality of various phases of transportation I find as a result of our investigations in the field.

Q. Mr. Hagarty, briefly, would you state for the record your participation in or knowledge of this particular case here? I want to kind of turn you loose and let you make a statement into the record.

A. I am afraid it can't be very brief, because it has been over a period of some seven or eight months.

[fol. 216] Q. What you know would be helpful in determining the issues in the case.

A. Having been here the previous day of court, I am familiar with the case, and from the standpoint of this case I think that a conference held at the Arkansas Public Service Commission office on January 26, 1950, is probably of the most importance of anything that occurred.

Q. That conference was between who?

A. Mr. Meehan and Mr. Chandler of the Arkansas Public Service Commission. I was present, and Mr. Eldridge was present.

Q. That is the Mr. Eldridge—

A. (Interrupting) Who is the general traffic manager.

Q. All right.

A. Mr. Kossell—I don't know his first name. He came from Chicago, I believe; and Mr. James Wrape.

Q. Mr. Wrape was present?

A. I believe so.

Q. Was Mr. Whittington present?

A. Yes, Mr. Whittington came, also.

Q. Is that Mr. Frank E. Whittington?

A. Yes, sir.

Q. What was the effect of that conference?

A. That conference was held after Mr. Chandler had preferred charges against one or more of the carriers transporting Fry Roofing Company's materials from Memphis into Arkansas.

Mr. Elliott: If the Court please, unless this witness is being introduced for the purpose of impeaching another [fol. 217] witness who has heretofore testified, I fail to know the relevancy or any competency or pertinent any conference he attended, or anything.

Mr. Warren: It is definitely for impeachment purposes.

The Court: I think probably, from the trend of the testimony so far, they are going to try to show—this is just my opinion—that Whittington has a contract, that he had been operating under that, would be a violation of the Arkansas law unless he obtained a certificate that these contracts of

a later date, photostatic copies of which have been admitted, are different from the one they operated under before.

Mr. Elliott: We admit that.

The Court: I know you admit it, and I think they are following—I imagine the idea would be to try to show that Whittington was in violation of the law and he changed it up in an effort to make it comply so they wouldn't have to have a certificate.

Mr. Elliott: We don't admit that. What I am saying, what relevancy could this man's impression of a conference held between people under a statute over which he has no jurisdiction.

The Court: I don't know about an impression. Frankly, I think myself that there was nothing definite that was determined at this conference, was there, in the way of procedure in these cases of arrest?

A. (Witness answering) There was definite action taken. [fol. 218] I don't know that you could have called it any definite conclusion.

Mr. Elliott: There was no action on his part.

Mr. Warren: He put his statement in, and Mr. Elliott objects to it. Mr. Elliott seems to anticipate what he is going to say.

The Court: I don't think it is material about this witness' impression as to what happened there. I think it would be admissible if he was a representative of the Interstate Commerce Commission if he made statements whether or not the method in which the company, the Whittington company, and the drivers, was a violation of the rules of the Interstate Commerce Commission. As to that extent, certainly if he went into the hearing and found out what has been done, that he would have a right to express his opinion. I don't think it would be binding upon this Court because he is not—well, the Interstate Commerce Commission, they have a corps of attorneys, of course, and they get advice of the Attorneys of the United States, I imagine, on things. But if a given state of facts, based on his experience in the past, caused him to believe they were violating the rules of the Interstate Commerce Commission, I believe he would have the right to state that for whatever it would be worth, and then you would have a right to cross-examine him. As to

whether or not he was a legal representative or an administrative advisor—

Mr. Elliott: (Interrupting): We do want to point out there is no alleged violation of Federal Interstate Commerce Commission law there, and neither has it been established this man is authorized to express the official opinion [fol. 219] of the Interstate Commerce Commission.

Mr. Warren: An alleged act of a known violation, which was put in for the purpose of giving the impression it was all right with the United States Interstate Commerce Commission. It has nothing to do with this case, and now Mr. Elliott has said he doesn't have anything to do with the case as a representative of the ICC.

Mr. Elliott: I am not inclined to argue about that. The comment was made, and I am just making my statement.

The Court: In other words, suppose they were operating down here in a manner that Mr. Hagarty believes it was in violation of the Interstate Commerce Commission, he wouldn't have to come to the State, he could go directly to the Interstate Commerce Commission. That is how you would do it. You wouldn't come to a State agency to get their advice.

A. (Witness answering) All of my activities records are with Washington, and I take instructions from them always.

The Court: From Washington? Whatever you want to put in the record, go right ahead.

Mr. Warren (Continuing):

Q. Mr. Hagarty, were you not asked to attend the January 26th, 1950, conference at the Arkansas Public Service Commission, by the officials of the Arkansas Public Service Commission?

A. Yes, sir, I was.

Q. Were you not asked to sit with them and advise with them in assisting them in the solution of the problem then facing them?

A. Yes, sir.

[fol. 220] Q. And at the request of the State, you attended in that capacity?

A. Yes, sir.

Q. All right. Now, at the time of the conference, January 26, 1950, had you or any person there who expressed him-

self seen a copy of one of the contracts or leases between Whittington and the driver-owners?

A. Yes sir. I had seen one. It was a photostatic copy of one. It wasn't an original.

Q. You had not seen an original to that thing?

A. No, sir.

Q. Did you ask for an original?

A. Yes, sir.

Q. To whom did you make that request?

A. A general request to those present.

Q. Did anybody produce an original?

A. Yes, sir.

Q. Who was it?

A. Mr. Eldridge.

Q. To whom did Mr. Eldridge give that original?

A. To me.

Q. To you?

A. Yes, sir.

Q. At the last hearing, did you examine the copy I had in my possession and requested you to see it at the last hearing?

A. Yes, sir.

Q. That is the original?

A. That is the one I got from Mr. Eldridge, yes, sir.

[fol. 221] Q. That is the one that now is an exhibit in this case?

A. I presume it is. I didn't see it presented as an exhibit.

Q. That is Exhibit 1 to the deposition of Mr. Frank Whittington?

A. Well, this is not the copy that I got.

Q. Is that a copy of the copy?

A. From this quick glance, I would say it is, but of course I haven't had time to compare it.

Mr. Warren: Would you gentlemen stipulate, or do you want to take time to compare?

Mr. Elliott: I frankly haven't read it. I presume it is a copy. If you represent to the Court it is an exact copy, that will be all right. Do you represent to the Court that is an exact copy?

Mr. Warren: Yes, we represent that is a copy of the lease that was handed to us by Mr. Hagarty.

Mr. Warren (Continuing):

Q. As a matter of fact, this is the agreement with your notations in your handwriting on it?

A. Yes, this is the one.

Q. This is the one?

A. Yes.

Q. ~~Is~~ there is any question about it, this is the one we are going to use. We had it copied.

The Court: It is all right. Just introduce the copy with their right to compare it.

Mr. Warren: At any time, Your Honor.

Mr. Warren (Continuing):

[fol. 222] Q. And Mr. Eldridge gave you that copy?

A. Yes, sir.

Q. Now, what representation was made by Mr. Kossell or persons present at that conference, as to arrangements entered into in other operations of Fry?

Mr. Elliott: If Your Honor please, what representations were made by Mr. Kossell or other persons at that conference; in the first place, I hadn't established that Kossell represented Fry Roofing Company, and certainly we don't know who the other persons are, and we should know who made the representation if made.

Mr. Warren (Continuing):

Q. Did Mr. Kossell make representations of the Fry Roofing Company or Whittington; at the conference?

A. I can only state my understanding. I don't know that there was any representations definitely made.

The Court: Of course, unless it was definitely understood, why it wouldn't be proper to quote the statements of somebody else; unless we knew they represented somebody.

Mr. Warren (Continuing):

Q. In the presence of Mr. Whittington and Mr. Eldridge, was Mr. Kossell speaking for the parties involved in this conference?

Mr. Elliott: We object to that.

The Court: This idea—the idea is this: The drivers of Whittington, the trucking company, the Fry Company, if Mr. Hagarty knows, did any of them represent to you, say that “I’m representing Whittington”?

[fol. 223] A. (Witness answering) There were no statements that Kossell represented Fry Roofing Company, but from the course of the conversations we had, it was my clear understanding he was representing Fry Roofing Company.

The Court: It wouldn’t be admissible. You can put it in.

Mr. Warren (Continuing):

Q. Was the statement made in the presence of Mr. Eldridge from the Fry Roofing Company?

Mr. Elliott: What statement, if Your Honor please?

Mr. Warren: I am attempting to put in—I am trying to show at a conference in which Mr. Eldridge, who has testified as general traffic superintendent, and Mr. Whittington was also present, on one side, and Mr. Kossell, who was speaking with them, that this witness will testify that the arrangement was explained for the Public Service Commission as an expert sitting with and advising with the Public Service Commission sitting with him, and was also explained this same arrangement was made in other parts of the country by Lloyd A. Fry Roofing Company by other people.

Mr. Elliott: That wasn’t the question. If it was, it is wholly material.

Mr. Warren: Because you deny any knowledge of any part of anything that went on in the Gray Brothers, Inc., and Fry Roofing Company. At the first hearing the record will speak for itself. I don’t intend to argue about it. I had this information in my hand at the time. I want to show this same company—this plan down there as submitted to the Interstate Commerce Commission—this same plan—this same plan with a contract identical with the contract, the [fol. 224] lease agreement, that is between Whittington and these owner-drivers.

The Court: The old contract, or the new one?

Mr. Warren: The old contract. I am going to plead this as a pure subterfuge for violations of the Arkansas law, and I think I am entitled to show it. This was a conference

with the defendant, the officials of the State of Arkansas, wherein the arrangements and the plan was set out in order to determine its legality and try to work out some way they could get around the law, whether they could or not, and I think I am entitled to show what went on at that conference.

The Court: If you are sure, you can show who they represented. Mr. Eldridge was there admittedly as a traffic man for the head company, the Chicago company. Any representations he made—also, Whittington was there in person.

Mr. Warren: And Mr. Kossell was there speaking on their side.

Mr. Elliott: We don't know anything about Kossell.

Mr. Warren: You don't know anything about Mr. Kossell?

Mr. Elliott: I have never heard the name before until today.

Mr. Warren: May we excuse this witness and call Mr. Eldridge?

The Court: All right.

Witness excused.

[fol. 225] Mr. E. J. ELDRIDGE, having been previously sworn, was called to testify by the defendant, and testified on his oath as follows:

Direct examination.

Mr. Warren:

Q. You heard the testimony of Mr. Hagarty. Who was it—was it Mr. Kossell that appeared at the hearing?

A. At that time I don't think he had any official status. At that hearing, or later, I think he was employed by Whittington.

Q. I don't see his name.

A. James Kossell.

Q. Where is he from?

A. Chicago, Illinois.

Q. Was he an attorney?

A. No, sir.

Q. An accountant?

A. No, sir.

Q. Was he at that time employed by Fry Roofing Company?

A. Never.

Q. Who did he come with?

A. I don't know. You mean to Little Rock?

Q. Yes, to the hearing.

A. He came over, I think, with Whittington and myself.

Q. He came with you and Whittington? Do you intend to imply to the Court he was a mere interloper in there?

A. I didn't say that.

Q. Was he in that conference with you and Mr. Whittington and participating in your company?

Mr. Elliott: I don't think that is proper. That is a double-barrelled question, if Your Honor please. He ought to break it down.

The Court: Make it one question.

Mr. Warren (Continuing):

Q. Was he at the conference at the invitation of you?

A. I don't believe he was there by invitation.

Q. Was he there—at the conference there at the invitation of Mr. Whittington?

A. I can't answer for Mr. Whittington.

The Court: Did he participate?

A. (Witness answering) He was there.

The Court: He may have been there and not opened his mouth. Was he an active participant?

A. (Witness answering) Not that I recall.

The Court: You don't remember him making a statement to Mr. Hagarty as to the arrangements made?

A. (Witness answering) I can't remember what off-side conversations we had. I had, I think—I think all of the talking was to Meehan and Mr. Chandler and Mr. Hagarty had some off conversation generally. This was all off conversation.

The Court: Did Mr. Kossell come down with you?

A. (Witness answering) I don't remember. I travel all of this country and I bump into everybody else. I don't know where he left.

The Court: You think later on he becomes an employee [fol. 227] of Whittington?

A. (Witness answering) I think so.

Mr. Warren (Continuing):

Q. In what capacity?

Mr. Elliott: If the Court please, he can't speak for him.

Mr. Warren: Isn't it evident, Your Honor, that this is an effort to keep out evidence?

The Court: I would like to know how he happened to be there.

Mr. Warren: People aren't just going to walk in there and start talking.

Mr. Elliott: If he is not employed by us—we have no knowledge.

Mr. Warren: Here are people asking you to enjoin the law enforcement of Arkansas, the sovereign State, and come in open-handed—

Mr. Elliott (Interrupting): I am very open minded. I resent the attack by a representative of the State.

Cross-examination.

Mr. Elliott:

Q. Is this man Kossell an employee of Fry Roofing Company, or has he ever been an employee?

[fol. 228] A. No, sir, never has.

Q. Has he ever been authorized to represent you in any capacity at all?

A. No, sir.

Q. The conference to which you are referring there, were you represented by Mr. James Wrape?

A. Mr. Wrape was not present.

Q. You didn't have an attorney at all?

A. No, sir.

Q. Any other representative of Fry Roofing Company there, with the exception of yourself?

A. I don't believe so. It would be Mr. Hecht, and I don't believe he was there.

Q. Did you procure the attendance of Mr. Kossell or Mr. Whittington or anyone else at that conference?

A. I believe it was one of the conferences we had. I believe that at that particular one, I happened to be in Memphis and came over with Mr. Whittington. I don't recall those circumstances. It was a very informal meeting and nothing we said there was formal or binding on us in any way, shape or form.

Witness excused.

[fol. 229] Mr. REUBEN K. HAGARTY, having been previously sworn, resumed the stand and testified upon oath upon behalf of the defendant as follows:

Direct examination.

Mr. Warren:

Q. The question I asked Mr. Hagarty was whether or not Mr. Kossell, in the presence of these gentlemen, had stated that the arrangements being presented to the conference at that time was identical with the arrangements being made by Fry Roofing Company in the other sections where they operate. I think the question is admissible.

A. Mr. Kossell did not say that, sir.

Q. Who said that?

A. Mr. Eldridge said it.

Q. Mr. Eldridge?

A. Yes, sir.

Q. While Mr. Eldridge was on the stand, did you not examine a memorandum which you had prepared and which I hold in my hand, which refreshed your memory to the fact that Mr. Eldridge made the statement?

A. Yes, sir.

Q. All right, now, what was that statement Mr. Eldridge made?

A. When I asked for the copy of the agreement between motor truck drivers, operators, and the lessor, Mr. Eldridge supplied me with a copy. I have testified to, and made the general statement this was going to be an arrangement that was going to be entered in all of his plants, some 19 [fol. 230] of them in various parts of the United States.

Q. Is that the same arrangement that is a part of the

petition for determination of status in behalf of the Lloyd A. Fry Roofing Company and Gray Brothers, which was submitted to the Interstate Commerce Commission?

The Court: Is it identical?

Mr. Warren: Yes, sir.

The Court: Let him answer it if he can state.

A. (Witness answering) From this petition, I would say it is.

The Court: You have read the petition?

A. (Witness answering) Yes, sir.

Mr. Warren (Continuing):

Q. Did you supply this petition?

A. Yes, sir.

Mr. Warren: I'll ask that be introduced. I am attempting to show subterfuge.

Mr. Elliott: Here is my objection: He is not making reference to any contract that has ever been in existence between Mr. Whittington and anybody else. He is making reference to a petition filed with the Interstate Commerce Commission by Lloyd A. Fry Roofing Company and Gray Brothers. Now the petition has no relevancy in this case.

Mr. Warren: The petition sets forth the lease agreement, which is identical.

The Court: This petition—you say you have read it—is that identical with the plan that Mr. Eldridge stated in this meeting was being carried out by Fry Roofing Company in its various operations over the country?

A. (Witness answering) As near as I can understand it, it is identical with the arrangement I discussed at the meeting on January 26th. It definitely represents the same thing.

The Court: Did they represent the same thing?

A. (Witness answering) Yes, sir.

Mr. Warren: The reference to the exhibit, which is the same thing—is the same thing as the blank form that was represented here as Whittington represented he was going to enter into and had entered into, as an exhibit in this case, and we are trying to exhibit the two together.

Mr. Elliott: May I say what you're referring to? Let's see if it has a date on it. Filed March 17, 1950, and he is

testifying now to a conference that took place on January 26, 1950.

Mr. Warren: At which time it was represented to him this plan was going to be submitted—this arrangement that was going to be made all over the United States.

The Court: If he can say it is identical to that plan that Mr. Eldridge is preparing, the Fry Roofing Company; as traffic manager from Chicago, represented to him at the conference that this plan was going to be put in operation generally, the Fry Company as its operations over the country, he would have a right to testify.

Mr. Elliott: Would Your Honor require counsel to ask him, or permit me to ask him, when that petition was recognized at the conference on January 26, 1950?

[fol. 232] The Court: I wouldn't imagine it did, because it was filed afterwards.

Thereupon, said petition for determination of status in behalf of Lloyd A. Fry Roofing Company and Gray Brothers, Inc., was introduced and received into evidence and marked Exhibit #34 hereto.

A. (Witness answering) I might be able to clear the record of a controversy. The general plans consist of two contracts, one between the lessor and the lessee, and another between the truck driver and the lessor, and both of those contracts were presented at the January 26th conference, and they both appeared identical in this exhibit that has just been presented.

Mr. Warren (Continuing):

Q. Mr. Hagarty, are you at liberty to, or are you so advising, that you can tell us what disposition has been made by the Interstate Commerce Commission?

A. I have no official knowledge of disposition.

Q. Now, Mr. Hagarty, did you on February 16th, 1950, write a letter to Mr. Eldridge after this January 26th conference, advising him of the legality or illegality of the arrangement?

A. What date did you say?

[fol. 233] Q. February 16th.

A. Yes, sir.

Q. Will you read that letter, please, sir?

A. This is a letter addressed to Mr. E. J. Eldridge, Traffic Manager of the Lloyd A. Fry Roofing Company, Summit, Illinois. Dear Mr. Eldridge: At our conference held at the Arkansas Public Service Commission offices on January 26, 1950, for the purpose of discussing the arrangement employed by you whereby trucks are transporting your company's product in interstate commerce, I promised to inform you of the position to be taken by our Bureau of Motor Carriers in relation to said arrangement. I am now informed that our Bureau believes the transportation being performed is of a "for hire" nature and should be continued only under appropriate authority of the Interstate Commerce Commission, and in full compliance with its rules and regulations. I desire to inform you by this letter that a continuation of the transportation under the arrangement evidenced by the "Leasing Agreement" entered into between Lloyd A. Fry Roofing Company, a corporation, and Frank E. Whittington Co., dated September 30, 1949, supplemented by verbal understandings involving conditions of employment of truck drivers, will be at the peril of the parties. In a number of instances shippers have been charged and convicted in criminal proceedings as aiders and abettors for knowingly engaging the services of unauthorized motor carriers or motor carriers who have not filed rates. The Bureau solicits your cooperation in the enforcement of the Interstate Commerce Act. An acknowledgment of this letter will be appreciated. Very truly [fol. 234] yours, R. K. Hagarty, District Director.

Q. Was that letter acknowledged?

A. Yes, the letter was acknowledged, sir.

Q. Now then, Mr. Hagarty, it was testified—

Mr. Elliott (Interrupting): I think the witness was going to read the acknowledgment.

Mr. Warren: Will you please let me conduct my case? Do I have to submit to this gentleman interrupting?

The Court: I would like to hear the position he took at that time, back before this petition was filed.

Mr. Warren: [This complaint?]

The Court: That was filed in March, and this letter was in February.

A. (Witness answering) This is a letter dated February 22, headed Lloyd A. Fry Roofing Company, addressed to Mr. R. K. Hagarty, Bureau of Motor Carriers, at 515 East Second Street, Little Rock, Arkansas. Dear Mr. Hagarty: We wish to acknowledge receipt of your letter of February 16 regarding our private carrier operation at our Memphis plant. We carefully noted all of your remarks and subsequently referred the entire matter to our counsel. They have again advised us that our operation, in all phases, is perfectly legal and that we are observing whatever portions or sections of Interstate Commerce Act that are applicable to an operation of this nature. We are eager to continue observing all the rules and regulations that apply to our operation, and shall be glad to consult with you upon completion of your investigation. Signed; E. J. Eldridge, [fol. 235] General Traffic Manager of the Lloyd A. Fry Roofing Company.

The Court: Go ahead.

Mr. Warren (Continuing):

Q. The question was asked this morning whether or not Mr. Goodwin of Memphis, Tennessee, had registered any complaint of the method or of this arrangement that was made. Who is Mr. Goodwin?

A. He is District Supervisor of this Interstate Commerce Commission Bureau of Motor Carriers at Memphis, Tennessee.

Q. Has he notified anybody that it is illegal?

A. I think he has notified several.

Mr. Elliott: If Your Honor please, we object—

Mr. Warren (Continuing):

Q. (Interrupting) Do you know he has notified several?

Mr. Tarlowski: That didn't make any difference.

The Court: Several people besides these.

Mr. Warren (Continuing):

Q. The drivers are the ones I am trying to get to. Has Mr. Goodwin, according to your Interstate Commerce Com-

mission files—has he notified these driver-operators that their operation is illegal? They are all in the same pot together. That is our contention, and I think we are entitled to show it.

The Court: I don't think you can show it by this man. He didn't have charge of the Memphis office. Did you get letters?

A. (Witness answering) I have copies of letters that were sent to the truck drivers.

The Court: I understand.

[fol. 236] Mr. Warren: It is not the best evidence to the question this morning of the inference that Mr. Goodwin at Memphis knew this and did nothing about it. I am just trying to get that back out of the record.

The Court: He didn't get any of them under arrest, according to the record, and you all are trying to put him in jail. I don't know what he did. I would like to know what he did, but I would like to know from his records and not from hearsay. This gentleman is clear out of it.

Mr. Warren: It is in his district.

Mr. Elliott: No, it isn't.

Mr. Warren (Continuing):

Q. Aren't those letters in this district?

A. As to operation in Arkansas, it is in my district.

The Court: Oh, well—

Mr. Warren (Interrupting): I want to make an offer.

The Court: Let him put it in. It is not competent, but you have a right to offer it and let him—just ask him. Have you copies of those letters?

A. (Witness answering) I have office copies of letters written by Mr. Goodwin to several of the driver-owners.

Mr. Elliott: Now, the copies, if anything is going in, are certainly the only things admissible.

The Court: You never inspected the originals?

A. (Witness answering) And those put those drivers on notice.

Mr. Warren (Continuing):

Q. You mean when you put them on notice, you mean as [fol. 237] to the fact it was illegal?

A. As to the illegality.

Mr. Elliott: He says he has copies. Let him put the copies in.

The Court: Well, we'll let it in for the purpose of the record.

A. (Witness answering) I can read one of these copies in the files.

Mr. Warren: That is what I want him to do, and state who all they were written to, read one of them.

Mr. Warren (Continuing):

Q. Read one of them—go ahead.

A. This is a letter addressed from 207 Post Office Building, Memphis 3, Tennessee, dated March 17th, 1950; registered mail; return receipt requested; refer to L & E 7B-522. This particular letter is addressed to Mr. A. D. Hollingsworth, 3796 Gamewell Road, Memphis, Tennessee. Dear Mr. Hollingsworth: Investigation made by this Bureau indicates that you have under lease to Mr. Frank Whittington, Memphis, Tennessee, motor vehicles which are sub-leased to Lloyd A. Fry Roofing Company by Mr. Whittington and used in transporting property of Lloyd A. Fry Roofing Company in interstate commerce. The investigation further indicates that you are employed as a driver of this equipment. This particular arrangement has been under consideration by the Bureau of Motor Carriers, and I am now informed that our Bureau believes the transportation being performed is of a "for hire" nature and should be continued only under appropriate authority of the Interstate Commerce Commission and in full compliance with its rules and regulations. I [fol. 238] desire to inform you that a continuation of the aforesaid transportation under the present leasing arrangement will be at your own peril and that of all parties involved. The Interstate Commerce Act provides rather heavy penalties for violations, and in many instances motor carriers have been charged and convicted in criminal pro-

ceedings for operating in violation of the Act and the Commission's regulations. Should you care to discuss this matter with me, or if there is any further information you desire with respect to the provisions of the Interstate Commerce Act, please feel free to call upon me. An acknowledgment of this letter will be appreciated. Yours very truly, W. F. Goodwin, District Supervisor. A copy to Mr. Frank Whittington, Route 1, Box 384, Memphis, Tennessee, and a copy to District Directors Hagarty and Craig.

Q. Who are the others?

A. I have three of these letters here. The other two are respectively to Dick G. Allen and to W. W. Hamilton.

Q. Mr. Hagarty, do you have anything further to add to your testimony that may be of assistance to the Court in determining this matter, any statement you could make that would be of assistance?

A. I was trying to think what might be of value.

Q. That is pertinent here to the issues.

A. Yes, there is one thing I think should go into this record here. So far as that meeting at the Public Service Commission on January 26th is concerned, Mr. Eldridge made the statement that he had consulted with several other [fol. 239] representatives of the Bureau of Motor Carriers. He named particularly Mr. Frank Purse in Chicago, and Mr. Jim Miller of Kansas City, and he stated that I was the first one in the Bureau of Motor Carriers whom he had contacted that took exception to the arrangement. He said that after I had made the assertion to all of those present it was my view that Mr. Frank Whittington was a broker of transportation and that transportation itself was of a for hire nature conducted by alleged employee-driver-owners of the vehicles. I know of no other statements.

Mr. Warren: That is all.

Cross-examination.

Mr. Elliott:

Q. Mr. Hagarty, I hand you here what has been filed as Exhibit #26, being one of five similar exhibits filed by the Arkansas Public Service Commission in this case. Did you ever see that contract?

A. Well, glancing at it quickly, I am of the impression this is the same contract that has been discussed here today.

Q. You mean that is the same contract that is attached to this petition that you have filed as Exhibit #33?

A. I don't want to be tied to that. There may be some corrections to that. It starts off the same way.

Q. Suppose you glance at it to any length of time you want to, and tell the Court whether or not you have ever [fol. 240] seen that contract before.

A. No, sir, I have never seen this contract before.

Q. Let's see which exhibits you are referring to. That is Exhibit #26. That one appears to be dated March 1. Here is Exhibit #28, dated February 27, which appears to be an identical contract. You have never seen that before, have you?

A. If it is the same as the other basically, I have not, no, sir.

Q. There are five of them. I hand you all of them, being Exhibits #26, #27, #28, #29, and #30. They are supposed to be identical with the exception of names, dates and equipment described.

A. If they are the same in blank, I have not seen them.

Q. Then neither you, in your present capacity as District Supervisor, or no other person of the Bureau of Motor Carriers has expressed any opinion with respect to the validity or non-validity of the contracts discussed?

A. That is not the question before the Commission.

Q. Do you understand this is a case before the Commission today, or that this is a case before the Chancery Court of Pulaski County?

A. I understand this is a case before the Chancery Court of Pulaski County.

Q. Then answer my question, whether or not you have ever expressed any personal opinion or whether or not there has been any official opinion expressed to the validity or non-validity under that Interstate Commerce Act reflected by the five Exhibits I hand you.

A. To my knowledge there has been none.

Q. You made reference to a form of contract that was discussed [fol. 241] between you and other persons at a meeting on January 26, 1950?

A. That is right.

Q. That was a blank form, wasn't it?

A. Yes, sir.

Q. It didn't bear the signature of any person?

A. That is right.

Q. Certainly, it was not presented or discussed at that time as being the operation which Fry was carrying on or proposing to carry on with Whittington?

A. Yes, it did definitely.

Q. I thought that the contract you referred to was a lease between the owner of equipment and the person he was going to subsequently release it to.

A. You didn't listen to my testimony. I asked permission of the Court to make the statement—that discussion in the conference on January 26th involved two contracts, one between the lessor and the lessee, and the other between the driver-owner and Whittington.

Q. Now, to which of those contracts did you take exception?

A. The combination of both.

Q. You mean that individually the contracts were all right, standing alone and apart?

A. They won't stand alone. That is the trouble.

Q. You were exhibited by counsel one contract which you identified as being that which is copied as an exhibit to Whittington's testimony. Do you recall that?

A. Yes, sir.

[fol. 242] Q. You say that is the contract that was under discussion?

A. That is right.

Q. What other contract was under discussion?

A. It would be easier to get it out of that exhibit filed by Whittington.

Q. The exhibit filed in March—March 17th, you told us a few minutes ago?

A. It was filed May 17th, 1950, in our section, and the certificate is now at Washington, D. C., and contains all or both of these contracts identical with the two contracts discussed on January 26th, 1950, at the Arkansas Public Service Commission rooms. Those contracts are shown in this petition as Exhibits 1 and 2.

Q. You say they are identical?

A. Yes, sir, I have proof read them to that extent.

Q. Don't put your copies away. I believe you said the contracts you saw on January 26th were in blank?

A. I said that is a copy that Mr. Eldridge gave me was in blank, but I had a photostatic copy of one which was not in blank, and I asked for an original and I got the blank original from Mr. Eldridge.

Q. Do you have the photostat to which you refer?

A. No, sir, it was sent to Washington. I can get it back again if you want to.

Q. To which did you make a comparison?

A. I had the copy that you exhibited in this case.

Q. Would you ask your counsel to furnish it here so we can see? Was it what he handed to you a few minutes ago [fol. 243] and said you had your notations on it?

A. Yes.

Q. Has that been filed?

Mr. Warren: No, it hasn't been filed. You objected this morning to filing it.

The Court: I thought a copy of that had been filed as an exhibit and the Court said they would have a right to compare it.

Mr. Warren: That is the one you offered a few minutes ago.

A. (Witness answering) The notations are, of course, mine.

Mr. Elliott (Continuing):

Q. Now, that contract that you have, which you say is identical, contains the names of no parties and no dates?

A. That is right.

Q. This does not purport to be a contract between the owner of equipment and any other person, does it?

A. I would like to have you repeat that question.

Q. I say, that does not purport to be a contract between the owner of equipment and any other person?

A. I would say that it does.

Q. Doesn't it begin "whereas, the party of the first part

is engaged in the business of leasing truck-tractor and trailer units for large industrial concerns?"

A. Read on.

Q. Can you tell me any place in the contract, if this is an [fol. 244] owner lease contract, where there is any provision made for the releasing of the equipment, or is this the only contract that you saw?

A. "Whereas, the party of the second part, driver-owner, is the owner of a lawfully licensed truck-tractor, or holds sufficient equity therein to lawfully lease same tractor to party of the first part. Said driver-owner must have sufficient experience in the operation of truck-tractor and trailer units to, through his own effort and initiative, be able to obtain and retain (during the life of this agreement) the status of truck-tractor driver on the tractor he leases the party of the first part with the concern the party of the first part leases his tractor to."

Q. I asked you simply to read—

A. (Interrupting) I answered your question.

Q. I asked you if that is the only contract you examined on the meeting of January 26th.

A. I say I have answered it already.

Mr. Warren: You have it in front of you, Exhibit #1.

Mr. Elliott: Well, sir, I don't have the Exhibit #1.

A. (Witness answering) This little book right there (indicating).

Mr. Warren: I call attention to the exhibit filed on the complaint that purports to have the contract of the leasing agreement between Frank Whittington and Lloyd A. Fry Roofing Company, and assume this is what Mr. Elliott is getting at.

Mr. Elliott: I am simply asking the witness. He says he had an identical copy of the contract. He said he had it on [fol. 245] January 26th.

A. (Witness answering) If you want to see the contract, I don't have it. It is in Washington.

Mr. Elliott. (Continuing):

Q. Now, between whom was that other contract executed that you say you saw on January 26th?

A. Lloyd A. Fry Roofing Company and Frank Whittington.

Q. You say you remember all the details of that contract perfectly?

A. Yes, sir.

Q. And simply by reading this Exhibit #1 to Exhibit #34, you are able to state from memory after all these months that this Exhibit #1 to Exhibit #34 was an identical copy of the contract you saw on January 26th between Whittington and Fry Roofing Company?

Mr. Warren: I'll object to that. That is the most unfair question—about three in one, and he is misquoting the witness. Now, that witness didn't say simply by reading—he said "furnished to me".

The Court: Let him say if he didn't say. If he knows that is an identical copy.

A. (Witness answering) You have put a lot of emphasis on the memory in that question. I have taken nothing from memory whatsoever. I have had these two forms of contracts in one shape or the other since before January 26, 1950, and my testimony is based upon the study of those over that period of time.

Mr. Elliott (Continuing):

Q. During all of that period of time you have endeavored [fol. 246] to get the Interstate Commerce Commission to take some formal action against Fry or Whittington, haven't you?

A. What is normally our procedure, yes.

Q. And the Commission has universally turned you down.

A. No, sir, they have not.

Q. Can you state to this Court that the Commission has filed a formal complaint against Whittington and Fry?

A. I can state nothing to my own knowledge, because I don't have the minutes of the proceedings of the various divisions of our Commission. I have knowledge by my regular office procedure that the Commission has instituted an ex parte proceeding in this case.

Q. In what case?

A. In the case of Lloyd A. Fry Roofing Company.

Q. What?

A. No, in the case of some 12 motor truck operators who had been at the time the Commission took action been employed on the basis of this contract right here.

Q. Now, we are getting a little bit too broad, I am afraid. Is the Lloyd A. Fry Roofing Company a party to that proceeding?

A. No, sir, it is not.

Q. Let's get back to my question. In spite of all of your efforts all of these months to get the Commission to institute a complaint proceedings against Fry and Whittington, the Commission has not seen fit to do so, has it?

A. Repeat that.

Q. In spite of all of your efforts all of these months to get [fol. 247] the Commission to institute a complaint proceeding against Fry and Whittington, the Commission has not seen fit to do so, has it?

A. I have had nothing to do with this case, have made no effort whatsoever to have anything to do with it since March 16th, 1950.

Q. Let me ask you this question, then, Mr. District Director. If a complaint proceeding has been instituted in the States over which you have supervision, you would have knowledge thereof, would you not?

A. Yes, sir.

Q. And you have had no knowledge of any complaint being instituted against Whittington or Fry?

A. No, sir, that is right.

Q. Your Commission has its own legal staff?

A. Yes.

Q. And enforces its laws or the laws under its supervision, either by complaint proceedings or by injunctive actions or by criminal prosecutions, doesn't it?

A. That is right, yes, sir.

Q. And you have no knowledge of any complaint proceeding, any injunctive action or any criminal proceeding being instituted by the Commission growing out of the Fry Roofing Company-Whittington operation?

The Court: Answer it yes or no, and you can make any answer.

Mr. Elliott (Continuing):

Q. Answer it yes or no. You have no knowledge of any [fol. 248] complaint proceedings, any injunctive action or any criminal prosecution having been initiated or procured by the Commission against Fry Roofing Company or Whitington growing out of the Fry Roofing Company-Whitington operation?

A. That is right.

Mr. Warren: You said he could add anything to that he wanted to.

The Court: Yes, and any explanation he wants to make.

A. (Witness answering) Your Honor, the official file indicates that the Commission recognizes Lloyd A. Fry Roofing Company as a shipper, and under that status there is no investigation permitted of Lloyd A. Fry Roofing Company under their procedure.

Mr. Elliott (Continuing):

Q. Now, from your general knowledge of the laws and regulations of the Commission, you know that the Congress has not applied any regulation or permitted any regulation of private carriers by the Commission until a need therefor be found, with the exception of hours of service and safety regulations?

A. That is right.

Q. That is correct, isn't it?

A. Yes, sir.

Q. What form number is it—this form that you used to write your letter of February 16th, the same form used, apparently, by Mr. Goodwin to write his letter of March 17th, 1950? What is the form number?

A. We have no form number.

[fol. 249] Q. Would you mind letting me have copies of those two letters, your letters of February 16th and Mr. Goodwin's letter of March 17th?

The Court: I take it the purpose of this—I think the letter of the Memphis district was inspired by this former letter, if they are identical.

Mr. Elliott (Continuing):

Q. Mr. Goodwin didn't receive a copy of your letter of February 16th, did he?

A. Apparently not.

Q. You had nothing to do with the writing of Mr. Goodwin's letter of March 3, did you?

A. Letter of March 3?

Q. You gave me a letter dated March 3. You read one dated March 17th, according to—

A. (Witness interrupting) I think that is an error. They are all March 3.

Q. You read a letter of March 17th to A. D. Hollingsworth.

A. Yes, sir, that is another group of them. These additional letters, as near as I say, are to a different group of drivers.

Q. And you and Mr. Goodwin didn't collaborate on the preparation of these letters?

A. If that is expressive of the fact that those letters carry out the same thoughts and the same expressions, we do not have any form of letter that is numbered, and I had a form to be used. We do have paragraphs which are selected at the discretion of one writing the letter to be employed in certain types of cases, and that undoubtedly accounts for the similarity.

[fol. 250] Q. My question is: And you and Mr. Goodwin did not collaborate in drafting these letters?

A. No, sir.

Q. And you were specific to not charge either of these parties with a violation of the law?

A. I have no right to charge them with a violation of the law.

Q. That is all right for the District Director, to have that right to say, or have the authority to say, you are violating the law or you are going to be prosecuted, or anything like that?

A. No, sir.

Q. For the purpose of the record, would you mind filing these letters in order, so that the great similarity of them may be apparent to, as exhibits to your testimony?

A. I will be glad to insert certified copies of them.

Q. That will be perfectly all right.

A. That is the letter dated February 16th, Mr. E. J. Eldridge, by you, and a letter dated March 17th to Mr. A. D. Hollingsworth by Mr. Goodwin.

The Court: Let me suggest that you have them marked as exhibits and numbered and return them and then you can send certified copies to the reporter.

Mr. Elliott: Well, then, the letter of February 16th will be offered as Exhibit #35 and the letter of March 17th #36.

Thereupon, said letters were introduced and received [fol. 251] into evidence and marked Exhibits #35 and #36, respectively.

Mr. Elliott (Continuing):

Q. Now, Mr. Hagarty, with respect to these various letters supposed to have been written by Mr. Goodwin to these various drivers, you have no personal knowledge or official knowledge they were actually written or mailed?

A. No intimate knowledge.

Q. Neither do you have any knowledge with respect to any conferences which may have been held by Mr. Goodwin with these people?

A. No, sir, I haven't.

Q. Nor of any response of these people to Mr. Goodwin?

A. That is right.

Q. Do you have—strike that question, please, sir, and let me rephrase it. I assume that you would have received copies of any letters written by Mr. Goodwin to either the Fry Roofing Company or to Mr. Whittington in this same connection, wouldn't you?

A. Yes, sir, if they were written.

Q. If they were written?

A. Yes, sir.

Q. Would you mind searching your files that you have here and tell us whether you have a copy of any letter from Mr. Goodwin to either Lloyd A. Fry Roofing Company or Frank Whittington or Frank Whittington, Inc.?

A. It is not necessary for me to search my file. There are not any there, because the case was transferred to Mr. [fol. 252] Purse in Chicago for handling.

Q. When was that done?

A. The date I mentioned I had nothing further to do with it.

Q. These letters you have referred to, one of them was March 17th?

A. That is just a case of an error of a day or two. In other words, Goodwin went over the case at the same time I did.

Q. In other words, your records stop with March 16th or 17th?

A. Yes, sir, in that neighborhood. I wouldn't want to be held to that particular time.

Q. Prior to that is when you had all of your correspondence and Mr. Goodwin had all of his correspondence?

A. Yes, sir.

Q. And when Goodwin was writing letters to drivers?

A. Yes, sir.

Q. Can you look through your file and tell us whether you have copies of any letters from Mr. Goodwin to the Lloyd

A. Fry Roofing Company or Frank Whittington, Inc.?

A. To Frank Whittington?

Q. Yes, sir, or to Fry Roofing Company.

A. At any time? No, sir, I do not have such a letter.

Q. Which leads you to think that no such letter was written?

A. That is right.

Q. This Mr. Purse, who is he?

A. He is a District Director of Motor Carriers at Chicago, Illinois.

Q. He is the one conducting some investigation up there?

A. His investigations are included with the records that were sent to Washington, all right.

[fol. 253] Q. Those are involving certain specific parties?

A. Involving the Lloyd A. Fry Roofing Company and other parties that are leasing to Lloyd A. Fry Roofing Company.

Q. What is the number of that proceeding?

A. I don't think that it has been numbered.

Q. Will you give me or exhibit to me the document from which you make the statement that Lloyd A. Fry Roofing Company is a party to the proceeding—for the information,

the document is MC-C1188. The proceeding instituted by the Commission on its own motion, naming certain specified—

A. (Witness interrupting) The document under which the investigation is, is L & E 29049-8.

Q. L & E?

Mr. Warren: I want to object to Mr. Elliott sitting there and testifying. He is sitting there testifying—Mr. Elliott is testifying right into that record from his own file, reading about a document number. He just got through. The reporter was taking it. It has been going on the whole hearing. I don't think that is right. I don't think it does me any good to object. I don't believe he ought to be allowed to testify to extraneous matters from their own record.

The Court: He is on cross-examination. He is asking him. He was testifying.

Mr. Elliott: He gave me a number.

The Court: Counsel gave him one number. I don't know whether it is to confuse it. It was to help him. The witness gave him another number, which was taken down, and you [fol. 254] certainly oughtn't to object to another number.

Mr. Warren: I objected to him sitting there and reading, which will be in the record. It has been going on all the time. He hasn't been leaning across the table in the witness' face. He has been sitting there reading and testifying.

The Court: I have an idea he was trying to help the witness get hold of the proper number.

Mr. Elliott: I was, Your Honor.

Mr. Elliott (Continuing):

Q. You gave me the number L & E 29049-8?

A. Yes.

Q. Are there any preliminary numbers?

A. What do you mean?

Q. That is the whole docket designation?

A. Yes, sir.

Q. Will you read me the detail of the proceeding?

A. The L & E, in other words, is known as law and enforcement investigation.

Q. Are there any hearings held?

A. There are no hearings in law and enforcement.

Q. Has Fry been served with any notice of any investigation?

A. They certainly are aware of the fact that they are being investigated. In fact, they have been contacted on many occasions as well as having been put on notice in accordance with the letter I read into the record.

Q. This investigation is being conducted in Chicago?

A. That is right.

[fol. 255] Q. Do you have any information to lead you to believe that the Lloyd A. Fry Roofing Company-Whittington arrangement extends into Chicago?

A. I have no idea of it so far as the Whittington arrangement goes.

Q. You have nothing to indicate that L & E 29049-8 has any reference to any arrangement between the Lloyd A. Fry Company and the Whittington Company?

A. Yes, sir, I do. It has been represented officially in the proceedings that is here under discussion and which originated on January 26th in the January 26th meeting in the Arkansas Public Service Commission hearing rooms or offices—it has been represented that that is a typical arrangement for service by Lloyd A. Fry Roofing Company in behalf of its transportation at its 19 different plants, one of which is described in the petition filed by Lloyd A. Fry Roofing Company or its attorney with this Commission under date of May 17.

Q. And that had reference to an arrangement between Fry Roofing Company and Gray Brothers, Inc., didn't it?

A. That is right.

Q. That is not from Lloyd A. Fry and Frank Whittington?

A. No.

Q. And the only—it's been officially recommended to you—you were talking about whatever representation was made in the meeting of January 26th, 1950?

A. No, I am referring to Lloyd A. Fry—Fry's own petition to the Commission.

Q. That is a petition in the Gray Brothers case. Mr. [fol. 256] Hagarty, with reference to L & E 29049-8, I ask you whether it was not a fact that neither—it was not a fact that the Lloyd A. Fry Roofing Company and the Frank

Whittington Company or Frank Whittington, Inc., arrangement was not involved in that matter.

A. Lloyd A. Fry Roofing Company definitely is involved in that matter. Frank Whittington is not involved in that matter.

Q. And neither—

A. (Witness interrupting) Lloyd A. Fry Roofing Company is involved because of the investigation conducted at three different points, one in Memphis, one in Little Rock, and one in Chicago, all involving the correctness of this, then a typical plant to be employed at 19 different plants or thereabouts.

Q. When you refer to these, you mean the Exhibit #34?

A. That is right.

Q. And if this record should disclose that the arrangement between Lloyd A. Fry Roofing Company and Frank Whittington, or Frank Whittington, Inc., and the arrangement between Frank Whittington and such persons from whom he may lease equipment, are not those reflected by Exhibit #34, then this arrangement is not involved in that investigation, is it?

A. Then this arrangement between Frank Whittington and Lloyd A. Fry Roofing Company is not now involved in that investigating procedure.

Q. That is what I thought, and I want a positive answer, and now we have it. Now, you have no complaint, no personal complaint or official complaint, to make with respect to the arrangement between Whittington and Fry where Whittington owns the equipment, do you?

[fol. 257] A. I have no complaint against Fry Roofing Company or Whittington at all, until such time such transportation occurs.

Q. Under this arrangement, this transportation is occurring every day?

A. Yes.

Q. You understand in a portion of the instances a man owns equipment which he leased to Whittington, which Whittington subsequently releases to Fry?

A. That is right.

Q. Under that, with respect to other equipment, Whittington owns that equipment and leases it to Fry?

A. I was given that understanding, but the understanding has been corrected since then.

Q. It has?

A. Yes, sir.

Q. In what respect?

A. It is my understanding that Whittington did not live up to the agreement he made with the Arkansas Public Service Commission on January 26th, when he stated that he would restrict his transportation for Lloyd A. Fry in the State of Arkansas to vehicles that were then owned. There are three of them named, and it was the understanding he would restrict his transportation to that condition until a decision had been arrived at in court.

Q. Are you referring to a conference in which Mr. Tarlowski was present?

A. I am not sure whether Mr. Tarlowski was there, or not.

Q. Are you referring to a conference in which Mr. Wrape was present?

[fol. 258] A. We had a conference.

Q. Answer me yes or no. Are you referring to a conference in which Mr. Wrape was present?

A. Yes, Mr. Wrape was present.

Q. When an agreement was made with you?

A. Not with me—I didn't say that. I said with the Arkansas Public Service Commission.

Q. And what was the date of that? Do you recall the date of that?

A. No, sir, I can't name it. I may be able to find it in my file.

The Court: Some date later than January 26th of this year, I take it?

A. (Witness answering) Yes, sir.

Mr. Elliott (Continuing):

Q. As a matter of fact; you have no official interest that might not or might have been made between the shipper and the Arkansas Commission, that is, not your Commission?

A. I had no right to take an official interest in a thing of that sort. I reported the circumstances to our Washington people. That is all I did, and that is all I am required to do.

Q. Has any representative of Fry advised you that it has violated any agreement it had made with any Arkansas Public Service Commission official?

A. I have never talked officially to any Fry representative except as of January 26th.

Q. Now, has any representative of Frank Whittington or Frank Whittington, Inc., advised you that they have violated any agreement with the Arkansas Public Service Commission?

[fol. 259] A. I don't know why they should advise me.

Q. Did they?

A. No.

Mr. Elliott: No further questions.

Redirect examination

Mr. Warren:

Q. Mr. Hagarty, I believe you answered a question by Mr. Elliott stating the arrangement between Frank Whittington and Lloyd A. Fry was not now involved in investigation—not now involved in that particular investigation covered by that particular L & E number. What particular L & E number is an arrangement similar to this?

A. The only way I can explain it is to describe our system, if you will permit me to do it.

Q. All right.

A. Our Washington office sets L & E numbers, so-called for all cases in the field involving investigations—primarily investigations involving questionable investigations. Those L & E numbers run numerically in the office. The number behind the number refers to District 8, so that particular [fol. 260] investigation now involved, of the Lloyd A. Fry Roofing Company, is in District 8, and does not involve District 11, of which I supervise.

Mr. Warren: I believe that is all.

Re-cross examination

Mr. Elliott:

Q. Arkansas is in District 11?

A. That is right.

Q. And Tennessee is District 7?

A. Yes, sir, 7.

Q. And District 8 comprises what States?

A. Illinois, Indiana—I don't know the others—Michigan, I think.

Q. You have no information leading you to believe that the equipment which Fry leases from Whittington is being operated in any District other than 7 and 11?

A. So far as I know it does not.

Q. You have no information with respect to what may or may not be involved in ICC Docket MC-1188?

A. No, sir, I have not.

Mr. Elliott: That is all. Thank you, Mr. Hagarty. I have no further questions of this witness.

[fol. 261] MR. LEON. HECHT, a witness called on behalf of the plaintiff, having been previously sworn, was recalled and testified upon his oath in rebuttal as follows:

Direct examination

Mr. Elliott:

Q. Mr. Hecht, you have previously testified in this matter?

A. Yes, sir.

Q. And you have been in the witness room when Mr. Hagarty has been testifying?

A. Yes, sir.

Q. And heard reference made by Mr. Hagarty to copies of the numbers of letters to various persons who were employed by Fry Roofing Company as drivers, these letters being written by Mr. W. F. Goodwin, District Supervisor?

A. Yes, sir.

Q. When the drivers received these letters, did they bring them to you?

A. Yes, sir, Mr. Reisener or myself.

Q. Mr. Reisener is your assistant?

A. That is correct.

Q. As a result of the writing of those letters, did you or did you not have occasion to discuss the matters contained in the letters with Mr. W. F. Goodwin, District Supervisor for the Interstate Commerce Commission at Memphis?

A. I did.

Q. Will you state to the Court on various occasions when [fol. 262] you have advised Mr. Goodwin, ICC District Supervisor, of all of the details with respect to your arrangement with Mr. Whittington as well as the employment of your drivers?

A. He has been out to the office, and I have given him everything I have, and on Mr. Goodwin's initial trip he complimented me on how far I had advanced, being entirely new, with the safety regulations and from that angle. Later in the discussions on the phone, he asked if—I asked if we were in trouble, and he said no, it was a matter of form.

Q. These letters written to the drivers?

A. To use the exact words, I said, "Mr. Goodwin, are we in trouble? Are you going on arresting any of our drivers? I don't want to send them out." "No", he said, "that is a precaution", and he went into detail to explain to me that is somewhat of a form letter so if anything does take place that there has been a record that they were justly notified.

Q. They were putting you on notice the operation was being watched?

A. Yes, sir, and they were out to the office and looked it over, and I said, "Mr. Goodwin, are we doing anything wrong? If we are, I want you to advise me and tell me."

Mr. Warren: I want to object to that. Mr. Goodwin is not here. That is all hearsay.

The Court: He wasn't here to produce the originals of those letters.

Mr. Warren: They came out of the ICC files.

The Court: If you want to take time and take his deposition, we will let you do it. I think Mr. Goodwin—who [fol. 263] ever is in charge of that division over there—it would be admissible. You have a right to check into it to see if he actually told him that.

Mr. Elliott (Continuing):

Q. Without asking you what Mr. Goodwin said, you do say that you advised him fully with respect to the operation?

A. Yes, sir, as far as my information is concerned.

Q. Did Mr. Goodwin ever file a complaint or initiate any legal action against Lloyd A. Fry Roofing Company or Whittington, as a result of the operation?

A. No, sir.

Witness Excused.

Mr. Elliott: That is our case, Your Honor.

Mr. Warren: That is all, Your Honor.

(P. 185)

General Appearance & Development: Good ✓ Fair " Poor

The Travelers Indemnity Company

Hartford, Connecticut

Branch Office

APPLICATION FOR FIDELITY BOND

Bond No.

Agent

Premium \$

I hereby make application to THE TRAVELERS INDEMNITY COMPANY for inclusion in the amount of _____ Dollars (\$ _____), under a Fidelity Bond in favor of Lloyd G. Fry Roofing Co. in my position as Truck Driver at Memphis from Nov 1, 1949, and furnish information on all the following points to enable the Company to decide with full knowledge of the facts whether or not to give the bond.

- Full name of Applicant John Rushing Barker Social Security Act Account Number 500024757
Present Residence Address in Full 761 N. Holmes Memphis Tenn
How long have you lived there? 4 months If less than 5 years, state previous residence addresses and length of time you lived at each (cover 5 years) Washburn Ark. 2 years Memphis Tenn. 1 year Nashville 3 years
- Born at Lexington Tenn Date of Birth 6-20-18
- (a) { Married? 1 Number persons supported: Wife? 1 Children? 3 Others? 0
(b) Divorced? 0 Do they reside with you? Yes
(c) Full name of wife or husband Ruth R. Barker Address 761 N. Holmes
(d) Occupation of wife or husband (if separately employed) Clark (office)
- Name of Father J. Barker { Business Deceased
Address 1
Name of Mother Clara Barker Address 1
a. Names and addresses of brothers and sisters or of two nearest living relatives George R. Barker, Pine Bluff, Ark.
Catherine L. Lee, Indianapolis, Indiana
b. Names and addresses of wife's or husband's father, mother, brothers and sisters Ross Reynolds, Chambers Ark.
- (a) Income to be received from this employment? 2.00 Salary? \$ 782.50 per month (week, month, year)
Commission? 0 Bonus? 0
(b) Any other income? If so, state source and approximate amount. Truck rental 9¢ per mile.
- (a) Do you own real estate? no In whose name is the title? 0
Location 0 Conservative Valuation \$ 0 Incumbrance \$ 0
(b) Do you own personal property? no Conservative Valuation \$ 0 Loans thereon \$ 0
(c) State the amount of other debts owed or liabilities you are under. Give particulars (if none, so state). Payments on two trucks (amount) \$5.00
(d) Life insurance carried? If so, state for what amounts, when issued, for whose benefit and in what companies. none
- Have you ever been bankrupt or insolvent (personally or in business)? no If so, give particulars in separate confidential letter to the Company.

8. Do you receive goods, merchandise, or other property on consignment or similar basis? no
9. Have you ever been in arrears or default in your present or any previous employment or connection? no
If so, give particulars in separate confidential letter to the Company.
10. Have you been bonded previously? no When? no By Whom? no
Has any company ever refused to issue or continue a bond for you? no If so, give details.
11. Employment record for past 7 years. If you were at school during any part of this time, give dates of attendance at each school and name and title of administrative officer. List most recent employment first. If not employed for any period during such time, state period, residence address and name of an unrelated person who can confirm your unemployment.

PLEASE PRINT OR TYPEWRITE ALL INFORMATION CALLED FOR

Dates (Month and Year)		Name and Address of Employer	Employed as	Place at which You Worked (Town and Street)	Name and Present Address of Your Superior	Why Did You Leave?
From	To					
11/1/49	11/1/49	Bureau of	operator	Wicks		
11/1/47	11/1/47	Hager, L.H. Co	manager	Wicks		
11/1/46	11/1/46	Self	farming			
11/1/45	11/1/45	Hager Co.	mechanic	Wicks		
11/1/44	11/1/44	Tracy				

12. Have you ever been discharged from any situation? If so, state particulars. none
13. References. (Omit relatives, employers or persons in service of present employer.)

NAME	OCCUPATION	POST OFFICE ADDRESS Street and Number, if in a City
H. K. McKinnis	Shiriff	Clayton, Ark
J. H. Pridge	Shiriff	Wicks, Ark
Geo. L. Jacobs	Business	Clayton, Ark
P. H. Howell	Farming	Wicks, Ark

FOR GOOD AND VALUABLE CONSIDERATION, I agree upon demand to pay THE TRAVELERS INDEMNITY COMPANY (hereinafter called the Company) any loss, costs, counsel fees, damages or expense which it may sustain or become liable for because of my dishonest, fraudulent or criminal acts, or acts for which I am liable, by reason of its having become surety for me under this or any other bond or obligation, or any modification, continuation or renewal thereof; and the Company shall have the right to adjust, settle or compromise any claim or demand made against it, and the voucher or other evidence of payment shall be prima facie evidence of my liability therefor to the Company. I do also agree that said Company may decline to become surety for me on the bond hereby applied for, or if executed, the Company may at any time cancel or withdraw from the same without giving me reason for such action; that the Company or anyone who has furnished the Company any information concerning my character, habits, ability, financial responsibility or my reason for leaving any employment, shall not be responsible for any loss or damage that I may suffer in consequence thereof, any statutory provisions to the contrary being hereby expressly waived by me. All the terms and conditions of this agreement shall stand for the protection of any interested co-surety or reinsuring company.

It is agreed that no change or modification of or in the terms or agreements of this instrument shall be effective unless such change or modification is in writing and signed by the President, a Vice-President, a Secretary, or an Assistant Secretary of the Company.

Signed, sealed and dated this _____ day of _____, 19____

Witness: J. H. Pridge J. H. Pridge (Seal)

CERTIFICATE OF EMPLOYER

Applicant has been in the continuous service of the Employer since _____ and has never, to my knowledge, been in arrears or default. His accounts were last examined on the _____ day of _____, 19____, and found correct.

Dated the _____ day of _____, 19____

(Signature) _____ (Employer)

By _____

Employer's Business _____ Address _____

Return through Employer to The Travelers Indemnity Company Office at _____

TRANSPORTATION PAYROLL

Amphibia

PAYROLL PERIOD 3/1/50

[illegible]

*Exploration of Miscellaneous pay:

Approved By _____

Martin D. Wojcik

EXHIBIT 10

(p. 189)

LLOYD A. FRY ROOFING COMPANY
OF DELAWARE

SUMMIT, ILL. COMPTON, CAL. KEARNY, N. J. MEMPHIS, TENN. DETROIT, MICH.
WALTHAM, MASS. PORTLAND, ORE. HO. KANSAS CITY, MO.
STROUD, OKLA. MINNEAPOLIS, MINN. HOUSTON, TEX. BROOKVILLE, IND.
SAN LEANDRO, CAL. ROBERTSON, MEX. YORK, PA. MOREHEAD CITY, N. C.

PAY ROLL CHECK

TOTAL WAGES	32.50
O. A. BEN	58
UN. INS.	
WITHHOLD	3.80
GROUP or HOS. INS.	1.14
TOTAL DEDUCT	5.54

No 13924 262

WEEK ENDING MAY 12, 1950

PAY TO THE
ORDER OF

J. P. Rogers

\$ 32.98

EXACTLY \$32 & 98 CTS.

DOLLARS

**NORTH SIDE BRANCH
TO THE FIRST NATIONAL BANK
OF MEMPHIS
MEMPHIS, TENN.**

LLOYD A. FRY ROOFING COMPANY
OF DELAWARE

M. L. James

EXHIBIT 12

FORM - BMC 59 - Prescribed by the
INTERSTATE COMMERCE COMMISSION
Washington, D. C.

DRIVER'S DAILY LOG

(One calendar day — 24 hours)

Form approved, Budget Bureau No. 60 - R253

ORIGINAL - File each day at home terminal for one year
DUPLICATE - Driver retains in his possession for one month

1-24-50
(Month) (Day) (Year)

139
(Total mileage today)

106
(Vehicle or State license number)

Fry Roofing Co.
(Name of Carrier)

I certify these entries are true and correct:

Dick Allen
(Driver's signature in full)

Memphis Tenn
(Main Office Address)

Memphis Tenn
(Home Terminal Address)

	MID-NIGHT	1	2	3	4	5	6	7	8	9	10	11	NOON	1	2	3	4	5	6	7	8	9	10	11	Total Hours
1: OFF DUTY																									20
2: SLEEPER BERTH																									
3: DRIVING																									4
4: ON DUTY (Not Driving)																									

REMARKS

Check the time and enter name of place you reported and where released from work and when and where each change of duty occurred. Explain emergencies as provided in Rule 6 (c)

FROM: No. Little Rock Ark
(Starting point or place)

TO: Memphis Tenn
(Destination or turn around point or place)

USE TIME STANDARD AT HOME TERMINAL

FORM 59-1 JULY 1, 1947
REVISED JULY 1, 1947
276-279

EXHIBIT 13

EXHIBIT 17

191

FILE COPY
DELIVERY TICKET

20508

CONSIGNEE TO

ADDRESS

DESIGNATION

STOP
OVER
NO.

QUANTITY	DESCRIPTION	WEIGHT
115	ROLLS ASPHALT PREPARED ROOFING	7100
343	BDLS. " " SHINGLES	27065
	BOXES " INSULATED SIDING	
	BOXES " CORNERS	
	CARTONS ASPHALT PROTECTIVE PRODUCTS	
	PAIS " " "	
	DRUMS " " "	
	KEGS ROOFING NAILS	
	BOXES " " "	

RECEIVED ABOVE MERCHANDISE
IN GOOD ORDERTOTAL
WEIGHT

34065

X

SIGNATURE OF CONSIGNEE

DRIVER'S INITIALS

Factory Order No.

25837

Trailer Number

11

Tractor Number

110

280=283

EXHIBIT 21

EQUIPMENT INSPECTION REPORT

(Make Separate Report for Tractor and Trailers)

Date 1-24-50 1950Vehicle No. 110 Make International Tractor ☒ Trailer ☐Condition of Body OKCondition of Service Brakes ✓ Parking Brakes ✓Cooling System ✓ Steering Gear ✓Engine ✓ Exhaust ✓ Horn ✓Speedometer ✓ Reflectors ✓ Fuel System ✓Glass ✓ Leaks ✓Are both headlights working? ✓Is tail light working? ✓Is windshield wiper working? ✓Are auxiliary lights working? ✓Are signal devices in good order? ✓Are all tires and treads safe? ✓Are wheel lugs tight? ✓Fifth wheel connection ✓Air hose and connections ✓Electric lights connection ✓Saddle mount connections ✓Are windows and windshield in good condition? ✓

Are the following equipment carried and in good condition?

Fire extinguisher ✓ Spare light bulbs ✓ Spare fuse ✓Tire chains (if needed) ✓ Three pot torches ✓ Fuses ✓Red reflectors ✓ Red lantern (Electric) ✓Two red flags and standards ✓Is accident report card in dashboard bracket? ✓

Equipment to be checked by dispatcher and Lessor's agent, prior to leaving plant.

Signed [Signature]
Tractor Operator

(Make out in Duplicate after each trip)

1. Wilson Enterprises Inc 441 N Dunlap Driver
2. Self employed
3. Self employed

The foregoing information is true to the best of my knowledge. I understand that any falsification of above statements is sufficient cause for dismissal. If employed, I agree to abide by all rules and regulations of the Company. I further agree to respect the laws of all states and towns in which I drive and will diligently follow the safety rules as set forth by the Company or its agents.

Signature of Applicant Dick H. Allen

PHYSICAL EXAMINATION

General Appearance & Development: Good ☒ Fair ☐ Poor ☐

Head: Height 66" Weight 160

Eyes: For distance (without glasses) 20/20
(with glasses if worn) Left 20/20 Right 20/20

Evidence of disease or injury: None Color Vision (Ishara) Normal

Ears: Hearing, 20 ft: Right ear 20/20 Left ear 20/20

Disease of injury None

Mouth Normal Throat None

Thorax: Heart None

If organic disease is present, is it fully compensated? Yes

Blood pressure (sitting): Systolic 120 Diastolic 80

Pulse: Before exercise 72 After 2 min. rest 72

Lungs None

Abdomen: Scars None Abnormal masses None Tenderness None
Hernia: Yes ☐ No ☒ If so where? None
Is truss worn? None

Genito-Urinary: Scars None Urethral Discharge None

Reflexes: None

Rhomberg None Light R. Normal L. Normal
Pupillary None Left Normal

Accommodation: Normal

Knee Jerks: Right: Normal ☒ Increased ☐ Absent ☐
Normal ☒ Increased ☐ Absent ☐

Extremities: Upper None Lower None
Spine None

Laboratory findings if tests are indicated:
Urine: Sp.Gr. 1018 Alb. None Sugar None
Kohn: Negative ☐ Positive ☐

Date 10/24/49 Examining Physician Chas Eddins

This is to certify that I have this day examined Dick H. Allen and find him (physically fit)

(Physically fit only when wearing glasses)
(Physically unfit and disqualifying condition has been discussed with applicant)
to perform the usual duties incident to employment as a driver of commercial motor vehicles. This certificate is based upon information obtained in the making of a physical examination in accordance with the regulations of the Interstate Commerce Commission for the qualification of drivers and the standard form recommended for such examination. I have kept on file in my office this record of his examination.

Date 26 Oct 1949 Place Memphis Tenn

Signed Chas Eddins
(Examining Physician)

Applicant's Signature Dick H. Allen

[fol. 288]

SCHEDULE A

Trailers

Type	Name	Serial No.	Owner
FCGT-5530	Fruehauf-Carter	ME 8386	Frank Whittington, Inc.
"	"	" 8387	"
"	"	" 8388	"
"	"	" 8389	"
"	"	" 8390	"
"	"	" 8391	"
"	"	" 8392	"
FC-530	"	" 8393	"
"	"	" 8394	"
"	"	" 8395	"
"	"	" 8396	"
"	"	" 8397	"
"	"	" 8398	"
"	"	" 8399	"
AA-66	Trailmobile	41-901-01105	"
"	(Semi-Trailer)	"	"
"	"	41-901-01106	"
"	"	41-901-01107	"
"	"	41-901-01108	"

Tractors

Make	Model	Motor No.	Owner
White	WB 26	150A2349	A. D. Hollingsworth
Reo	E 22	331A68392	W. R. Lindsay
Mack	EHT	EN354-274-85	Doc C. Allen
GMC	HCA-471	A270766737	Oliver Batson
Ford	F 8	98-EQH684	J. A. Mayo
1 HC	KB8-1	RED401-18286	Frank Whittington, Inc.
"	"	RED401-14291	"
"	"	RED-401-9660	"
"	KB8	RED 361-20375	"
"	L-195	L-1952394	"
GMC	ACR620	A361684D	"
White	WB22	150A12021	"

[fol. 289]

WRAPE AND HERNLY
Attorneys at LawSterick Building, Memphis, Tennessee
1624 Eye Street, N.W., Washington 6, D. C.October 26, 1950
Memphis 3, Tennessee.Mr. W. Charles Webster, Court Reporter, Court House,
Little Rock, Arkansas.Re: Lloyd A. Fry Roofing Company vs. Arkansas Public
Service Commission, et al

DEAR MR. WEBSTER:

You will recall that upon trial of the above cause schedules of equipment were filed as exhibits to the deposition of Mr. Frank Whittington as well as to the testimony of Mr. Leon Hecht. We had not understood that we were to furnish license numbers for such equipment, and agreed to do so by way of letter to be attached to the exhibits as above.

Unavoidable delay has prevented earlier compliance with this agreement.

Referring to the exhibits, the trailers described thereon are all owned by Frank Whittington, Inc. No trailer licenses are required and no license numbers are, therefore, available.

With respect to the tractors, referring to same in chronological order as they appear upon the exhibit the White model WB 26, bore license No. 2 p/7 z 278; registered in the name of Lloyd A. Fry Roofing Company.

The Reo model E 22 was owned by W. R. Lindsey. Mr. Lindsey is no longer employed by Fry Roofing Company, nor is his tractor leased to Mr. Whittington or the Fry Roofing Company. We have been unable to locate this man, understand that he has moved to some point in the North-[fols. 289a-b] east; and the registration papers on this equipment were with the equipment. Our records do not reflect the license number of this tractor, and inasmuch as in Tennessee registrations are not kept alphabetically we would be forced to thumb through all registrations to locate this number.

Such would impose an unreasonable burden and, unless ordered so to do by the Court, inasmuch as this information is equally available to plaintiff and defendant, and apparently no pending case is based on the operation of this vehicle as is reflected by the testimony of record, we do not propose to pursue this matter further.

With respect to the Meek model EHT, license number was 2 P/7 Z 091. It was licensed in the name of Lloyd A. Fry Roofing Company.

With respect to the GMC model HCA-471, license number was 2 P/7 Z 242; licensed in the name of Lloyd A. Fry Roofing Company.

With respect to the Ford model F 8 the license number was 2 P/7 Z 206; licensed in the name of Lloyd A. Fry Roofing Company.

With respect to the HC model KB8-1 the license number was 2 P/7 Z 203, licensed in the name of Lloyd A. Fry Roofing Company.

With respect to the next HC model KB8-1 the license number was 2 P/7 Z 202, licensed in the name of Lloyd A. Fry Roofing Company.

With respect to the next HC model KB8-1 the license was number 2 P/7 Z 260, licensed in the name of Lloyd A. Fry Roofing Company.

With respect to the HC model KB8 the license number was 2 P/7 Z 201, licensed in the name Lloyd A. Fry Roofing Company.

With respect to the HC model L-195 the license number was 2 P/7 Z 272, licensed in the name Lloyd A. Fry Roofing Company.

[fol. 289c] With respect to the GMC model ACR620 the license number was 2 P/7 Z 219, licensed in the name Lloyd A. Fry Roofing Company.

With respect to the White model WB22 the license number was 2 P/7 Z 240, licensed in the name of Lloyd A. Fry Roofing Company.

As you know, briefs are due in this case on Thursday, November 2, 1950. Such briefs cannot be prepared until transcript of the proceedings is received. Will you kindly keep in mind our request that you let us have transcript of

the first day's proceedings immediately when completed in order that we may begin preparation of brief.

Very truly yours, (S.) Glenn M. Elliott.

GME/vgh

CC—Mr. Eugene R. Warren, Attorney at Law, Union Life Building, Little Rock, Arkansas. Mr. Louis Tarlowski, Attorney at Law, Rector Building, Little Rock, Arkansas.

[fol. 290]

EQUIPMENT LEASE

This agreement made and entered into this 1st day of March, 1950, by and between J. A. Mayo, a resident of the City of Memphis, State of Tennessee, hereinafter referred to as lessor, and Frank Whittington, Inc., of the City of Memphis, State of Tennessee, hereinafter referred to as lessee.

Witnesseth, that

Whereas, the lessor is the owner of one F 8 Ford tractor, having Motor No. 98EQH684, and desires to lease the use thereof to lessee and,

Whereas, the lessee is engaged in the business of furnishing motor vehicle equipment to large industrial concerns, for use by such firms in the transportation of their own property and,

Whereas, the lessee is desirous of acquiring the use of the lessor's tractor, to be used by lessee in lessee's business of furnishing equipment.

Now, Therefore, This agreement is entered into:

I

Each of the Parties acknowledges the receipt and sufficiency of a valuable consideration from the other.

II

The lessor hereby leases, lets and rents unto the lessee, and the lessee leases from the lessor, one (1) truck-tractor of F 8 Ford make, Motor No. 98EQH684, for the term and consideration and subject to the conditions hereinafter stated.

It being understood and agreed by the Parties hereto that lessee will use the leased tractor in lessee's business of furnishing motor vehicle equipment to industrial concerns and the right is here specifically granted to lessee to sub-let the leased tractor to any person of lessee's choosing.

III

The lessor agrees to equip and maintain the leased tractor so that it may be operated with both air or vacuum brakes and to equip said tractor with fifth wheel, extra gas tank and all required safety equipment.

The lessor agrees to properly maintain the said truck-[fol. 290a] tractor in good and efficient working order and pay all costs of operation of said tractor, including, but not limited to, all gasoline, oil, tires, replacement parts and repairs of any kind and, including all necessary license, road mileage tax and registration fees. It being further understood that in the event lessor fails to so maintain and keep the leased tractor, that the lessee shall have the right to furnish gasoline, oil, tires, and to make repairs and deduct for such costs from the rental hereinafter provided to be paid.

IV

In consideration of the lease of the aforescribed truck-tractor and, in consideration of the several covenants contained in this agreement, the lessee agrees to pay to the lessor, as rental, the sum of nine cents per mile, for all miles operated, as recorded on the speedometer and to make payments on rental on Thursday of each week, while this lease agreement is in effect.

V

The lessor agrees to paint, or cause to be painted, the leased truck-tractor in the color and manner and with the insignia, figures, symbols or names which may be designated by the lessee, said painting to be done at lessor's expense. Lessor further agrees to keep the truck-tractor washed, cleaned and polished during the term of this agreement.

VI

The lessor agrees to obtain, and have in effect at all times, proper and sufficient fire, theft and collision insurance on

the leased truck-tractor. In the event the lessor fails to effect such insurance, and to maintain such insurance, then, in that event, the lessee shall not be liable to lessor for the damage, loss, or destruction of the leased tractor.

VII

The lessor agrees to provide, keep and maintain, on the leased tractor, all safety equipment required by the Interstate Commerce Commission, or other regulatory body.

VIII

The lessor agrees that it will not make or charge purchases in the name of lessee, or in the name of the concern to whom lessee may sub-let the leased tractor.

[fols. 290b-294]

IX

It is understood and agreed that lessee and the concern to whom lessee may sub-let the leased tractor, shall have the full, exclusive, and complete use of the leased vehicle during the term of the lease.

X

The term of this agreement shall be for a period of three (3) years, but, it is understood and agreed, that either party may cancel this agreement, at will, on thirty (30) days written notice to the other party. It is further understood that lessee makes no representation, or guarantee, as to the number of miles the leased tractor will be operated for any given period.

Witness the hands of the parties this the day and date first above written.

Frank E. Whittington, J. A. Mayo.

Witness, S. E. White.

[fol. 295]

NOTE RE EXHIBIT 31.

The deposition of Frank E. Whittington, taken on behalf of defendant, was introduced into the record on page #177 as an Exhibit (#31) hereto. Said deposition appears on page #32 of this transcript.

[fol. 296] Present: Chas. C. Wine, Chairman; John R. Thompson, Commissioner; Richard McCulloch, Jr., Commissioner.

Case No. R-461

In the Matter of the Legality of Certain Motor Equipment Lease Practice.

CONFERENCE RULING AND ORDER

It has come to the attention of the Commission that there is some confusion existing in the minds of those concerned as to what constitutes a legal lease of motor equipment and what constitutes the difference between a bona fide truck rental business and a rendition of a motor carrier service by the purported lessor of the equipment to the lessee. In many cases purported leases have been executed which did not in fact create a lessor-lessee relationship, but, rather, created the relationship of shipper and carrier. The Commission has caused the matter to be investigated and hereinafter sets forth the rules which shall govern these situations in the future. These rules are in accordance with the Federal Rules for interstate operations as set forth in an order of the United States District Court of Minnesota, dated June 2, 1948.

It Is Therefore Ordered That, in cases where any one of the following situations exist, the purported lessor-lessee relationship shall be deemed to be the relationship of shipper and carrier, which will, of course, require the carrier to obtain authority from the Commission in order that he may operate as proposed.

(1) Where the alleged lessor directly or indirectly furnishes or selects the driver or drivers for the vehicles to be used;

(2) Where the lease is for a single, one-way trip, the lessor taking possession of the vehicle for further leasing

to another shipper for a return haul, or after discharge of the cargo at destination;

(3) Where the lessor assumes responsibility for safe delivery of the cargo transported or furnishes cargo insurance.

(4) Where the lessor recognizes liability for operation of the leased vehicle on the highways and furnishes public liability and property damage insurance payable to lessor or lessee as their interest may appear.

[fol. 296a] (5) Where lessor collects from purported lessee compensation for the rental of the vehicles, computed in rates in cents per 100 pounds or other unit of measure of property hauled, or at a truck mile rate or flat rate, which arrangement indicates a normal transportation charge instead of a charge for the use of the leased vehicle;

(6) Where the lessor issues receipts or bills of lading to the purported lessee for the contents of the cargo hauled on the leased vehicles;

(7) Where the lessor arranges for the segregation of the drivers' wages and has the shipper pay it, and then credits the amount of such wages on the agreed total compensation to lessor from the purported lessee;

(8) Where the drivers' daily logs are submitted first to the lessor and later transmitted to the lessee;

(9) Where the lessor exercises the principal control over the drivers of the vehicles, instead of that control being exercised by the lessee;

(10) Where the lessees fail to observe the provisions of the written lease relating to the selection of drivers.

The position of the Commission will be that, in order for the operations to be those of a private carrier, there must be a clear showing that the control and responsibility over the operations of the vehicle pass from the owner, renter or lessor, to the shipper, who, for the period of the agreement, exercises such control and responsibility over the operations of the vehicle as would be exercised by it if it were the owner of the vehicle.

By Order of the Commission, — — — —, Secretary.

Dated at Little Rock, Arkansas, this the 11th day of May, 1949.

[fol. 297]

GOLDMAN & Co.

Waste Materials—Burlap Bags—Army Goods

LITTLE ROCK, ARK.

June 26, 1950

Your Order No. 726

Sold to Volney Felt Mill, 704 Corrino Avenue, Memphis,
Tennessee.

Via Picked up Your Truck.

20 Bales Mixed Paper 20381 lbs.

Weight of Bales

1295	1027
696	1220
975	962
1080	905
1376	796
946	1145
1250	1272
816	840
1050	1020
1020	690

No. 7810

[fol. 298]

EXHIBIT 34

BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION FOR DETERMINATION OF STATUS IN BEHALF OF
LLOYD A. FRY ROOFING COMPANY AND GRAY BROTHERS,
INC.

William W. Collins, Jr., 928 Frick Building, Pitts-
burgh, Pa. Virgil J. Livingstone, 1143 Munsey
Trust Building, Washington, D. C., Attorneys for
Petitioners.

[fol. 298-1] BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION FOR DETERMINATION OF STATUS IN BEHALF OF
LLOYD A. FRY ROOFING COMPANY AND GRAY BROTHERS,
INC.

Comes now Lloyd A. Fry Roofing Company and Gray Brothers, Inc., and respectfully request the Interstate Commerce Commission to review the facts set forth herein after and provide a determination as to whether operating authority is required under the Interstate Commerce Act.

Lloyd A. Fry Roofing Company is a manufacturer of asphalt roofing and allied products with general offices at 5818 Archer Road, Summit, Ill., hereinafter called Fry Roofing. Gray Brothers Inc., is a corporation organized for the purpose of leasing or renting trucks.

Fry Roofing maintain numerous roofing manufacturing plants throughout the United States and are engaged solely in manufacturing. Until November 1, 1949, all roofing manufactured was sold F. O. B. plant. Due to competitive conditions prevailing in the industry it became necessary to change the method of marketing and in August, 1949 Fry Roofing conducted a survey of transportation available to serve their needs. The survey indicated a lack of adequate for hire transportation service available from a number of the manufacturing plants. Due to this situation Fry Roofing conducted a further survey as to the possibility of leasing or renting trucks and conducting a private carrier operation in the transportation of its roofing, Fry Roofing [fol. 298-2] have been approached by truck rental operators seeking to establish a rental operation. This survey was conducted during August and September.

During this period of investigation the applicable regulations appeared to be set forth in the case of John J. Casale, Inc., MC-20314 Decided December 3, 1948. 49 MCC 15. In this case Casale had a variety of operations including a lease truck operation. The trucks were rented to various business houses hereinafter called lessors under long term contracts of 4 years average duration for exclusive use of the lessor.

The report at page 25 discusses a previous lease case, H. B. Church Service Co. 27 MCC 191 and 33 MCC 160.

In this case the Division state "Essentially the issue is to who has the right to control, direct, and dominate the performance of the service.—the presumption arises that the transportation is performed by the carrier for compensation. *This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee.*" On page 28 the report states "In order for the operations to be those of a lessee or shipper as a private carrier, there must be a clear and unequivocal showing that it exercise control and responsibility over the operations such as would be exercised by it if it were the owner of the vehicle.

Fry Roofing decided upon determination that existing carrier service was inadequate to their needs and decided to proceed with a private carrier operation in a manner which would permit Fry Roofing to control, direct, and dominate [fol. 298-3] the performance of the service as set forth in the above indicated decision on the subject.

All drivers are hired by Fry Roofing and are paid from the Fry Roofing payroll, and are entitled to all benefit provided the employees of the company. The question of employment of the driver rests solely in each plant manager, subject to review by the general office. Dismissal of drivers rests solely with the plant manager, subject to review by the general office. All applications are made direct to the plant manager. Application forms are provided for employment together with required information as to physical status. The application forms that are approved are retained in the files of the plant manager.

A safety program is maintained and Fry Roofing comply with all ICC rules and regulations with respect to safety regulations.

All drivers are required to establish a fidelity bond. Log books are maintained in accordance with regulations.

The shipping department direct all details of loading, and the driver and vehicle operate as a unit of the plant.

The drivers employed by Fry own tractors, and must be willing to lease the tractor to lessor.

The drivers and the equipment, the tractor and semi-

trailer are assigned permanently to perform transportation service with the organization of Fry Roofing and are not assigned for the period of the lease to other shippers. [fol. 298-4] The driver is provided hospitalization by Fry Roofing.

Insurance is carried by Fry Roofing.

As indicated hereinabove, Fry Roofing to the best of their knowledge and ability have attempted to establish a private carrier operation. The trucks deliver roofing and return empty. Fry assumes entire responsibility for the safe delivery of their merchandise. Shipping documents are solely those of Fry Roofing and in no instance does the driver-employee have anything to do with preparation of the shipping documents.

With reference to Gray Brothers and other lessors, the lessors are corporations formed for the specific purpose of leasing trucks. A substantial number of semi-trailers were purchased by the lessors and are owned by the lessors.

There is attached to this petition and marked exhibit 1, copy of contract between Fry Roofing and Gray Brothers. Also attached as exhibit 2 is copy of contract between Gray Brothers and owners of the tractors.

Attention is directed to application covering MC-109996 Watson Manufacturing Co., M. C., Decided December 27, 1949.

There remains for consideration (1) the question of whether the Cohens are employees of applicant and (2) whether the lease of their equipment to applicant is bona fide.

As seen, applicant employs the Cohens and their equipment on a mileage basis payable weekly. It pays their social security taxes, unemployment insurance, and in all other respects holds itself out as their employer. The Cohens do not perform any other kind of work nor do they work for others. They are experienced and are [fol. 298-5] familiar with the motor-vehicle equipment leased to applicant. The lease of the equipment is for a term of 1 year payable on a mileage basis. In determining whether the lease of equipment to the shipper with driver furnished is for-hire carriage or private carriage,

it is necessary to ascertain who has control of the vehicle. Here, applicant pays the cargo insurance, directs the movements, garages the motor-vehicle equipment, requires the keeping of logs, requires doctors' certificates, and complies with all the rules and regulations prescribed under section 204 of the act. There is no question but that the applicant-lessee controls the tractor-trailer unit. See *Steel Transp. Co., Inc., v. Columbia Transfer Co., supra*.

Considering all the facts, we are of the opinion that the lease of equipment and the employment of lessors as drivers are bona fide.

We find that the motor-carrier operations now conducted by applicant in the manner above described are not those of either a common or contract carrier by motor vehicle, as defined in the Interstate Commerce Act, and that the application should be dismissed. An appropriate order will be entered.

It has been petitioners intention to establish a bona fide private carrier operation.

It is our understanding that the operation is identical to that conducted by Lustron and others for an extended period of time which was investigated by the Commission with a determination of private carrier.

[fol. 298-6] It is respectfully requested that the facts stated be reviewed and petitioners advised as to their status under the Interstate Commerce Act.

Respectfully submitted, William B. Collins, Jr., 928 Frick Building, Pittsburgh, Pa., Virgil J. Livingstone, 1143 Munsey Trust Building, Washington, D. C., Attorneys for petitioners.

[fol. 298-7]

EXHIBIT 1

Lease—Contract—Agreement

This contract, by and between Gray Bros., Inc., a Corporation, with its office at 2201 Indiana, Kansas City, Missouri, hereinafter called the Lessor, and Lloyd A. Fry Roofing Company, a Corporation, with its home office at

5818 Archer Road, Summit, Illinois, hereinafter called the Lessee, witnesseth:

That in consideration of the promises of the parties, each to the other, and in accordance with the terms and conditions as hereinafter set forth, Lessor agrees to lease, and does lease, to the Lessee, certain motor vehicle equipment, more particularly described below.

It is expressly understood that this is a contract of leasing only and that Lessee has by these presents acquired no right, title or interest in or to the property described in this Agreement.

Terms and Conditions

1. The equipment which Lessor agrees to furnish to the Lessee consists of tractor-tandem truck units, which units are more particularly described in Schedule "A" attached hereto, which said Schedules are herein collectively referred to as Schedule "A", and are made a part hereof by reference thereto the same as if rewritten at length herein.

2. Lessor agrees, at its own cost and expense, unless otherwise expressly provided in this Agreement to provide complete, suitable and adequate garage service, including washing, polishing, cleaning, oiling, greasing, inspection [fol. 298-8] and storage space for said vehicles; to provide all necessary state and City license tags for the state and city in which may hereafter be substituted for any of such vehicles, and all vehicles supplied as additional vehicles, in good repair, mechanical condition and running order; to furnish all necessary fuel, oil and other lubricants necessary for the operation of such vehicles; and to keep the painting and lettering on such vehicles in such condition that they shall at all times present a neat appearance. Any vehicle accepted by Lessee for use under this Agreement, shall, unless Lessee gives immediate written notice to the contrary, be conclusively presumed to have been in good repair, mechanical condition and running order when accepted by the Lessee.

3. Lessor will also provide at its own cost and expense, all necessary tires and tubes, including necessary

spare rims with tires mounted and ready for emergency service for each vehicle equipped with pneumatic tires.

4. Lessee shall deliver to the repair shop indicated by Lessor all vehicles needing repairs and such others as shall be requested by Lessor, for complete inspection and the necessary repairs.

Lessee also undertakes and agrees that Lessee's drivers will not make any repairs or adjustments to any of said vehicles (except substituting spare tires), and that in any and all cases of trouble, Lessee's drivers will notify the Lessor by the speediest means of communication, giving a description of the nature of the trouble and the location of the vehicle.

Lessor undertakes and agrees to make regular inspection of each such vehicle.

[fol. 298-9] Lessee undertakes and agrees that each of Lessee's drivers will at the close of each day, note on the "checking" report for the vehicle operated by him respectively any and all faulty operation or other trouble, if any, which he had with the vehicle.

5. Lessor will furnish Lessee with substitute vehicles to replace the vehicles returned by Lessee for repairs or service. Such substituted vehicles while in service of Lessee shall be subject to all of the terms and conditions of this Agreement the same as if specifically described in this Agreement, except that no lettering, painting or other alteration will be made by Lessor on such substituted vehicles.

6. Lessee shall procure all fuel, oil and other lubricants required for the operation of said vehicles under this Agreement where reasonably possible, from suppliers designated by Lessor, but where it is not reasonably possible, Lessee shall procure and pay for the necessary fuel, oil and/or lubricants and deliver to Lessor a receipted bill therefor whereupon Lessor will reimburse Lessee for such purchases.

7. The Lessee agrees to pay, and shall pay, to Lessor on Wednesday of each week, the entire amount due as rental for the use of equipment furnished to the Lessee during the preceding week, which amount shall be computed by both parties in accordance with rates set out

in Schedule "B" which is annexed to this contract and made a part hereof by reference thereto.

The Mileage Charge shall be computed at the rate specified under the heading "Mileage Rate" in Schedule "B", and on the basis of the total number of miles such vehicle shall have operated each week.

[fol. 298-10] 8. The number of miles over which any particular vehicle shall have been operated for any given period of time, shall be determined by means of a standard mileage recording device attached to such vehicle. Provided, however, that in the event the mileage recording device of any vehicle leased under this Agreement, shall, at any time which such vehicle is being operated by Lessee, fail to function, thereby rendering unavailable a correct mileage record for such vehicle, the mileage for any day, days or fraction of a day, when the mileage recording device is thus out of order, shall be computed on the basis of Lessee's shipping record.

9. Lessor agrees to furnish to Lessee on or before Wednesday of each week during the life of this Agreement, a complete record of the mileage readings for each vehicle leased under this Agreement, on leaving and returning to the garage, including the number of miles run each day together with a check-up record showing the time drivers left and returned to garage during the week ending the preceding Saturday. Lessor shall cause this record to be filled in and signed by an employee in charge of its garage. Lessee agrees to cause Lessee's drivers to sign daily the mileage record, checking out and checking in the vehicle operated by them respectively.

10. It is understood and agreed by and between the parties hereto that this Contract of Leasing shall be limited to the plant of the Lessee in N. Kansas City, Missouri.

Lessee agrees, as part of the consideration of this agreement, that the Lessor shall have the exclusive right to furnish Lessee with tractor-tandem truck units and Lessee will not lease any tractor-tandem truck units from any other party for its use during the term of this Agreement [fol. 298-11] for the plant specified herein except that customers of Lessee may provide their own transportation by motor vehicle if they so desire; in the event the Lessor

fails or is unable to supply sufficient equipment to meet the needs of Lessee then the Lessee, after notice to Lessor, may use other equipment furnished by other sources temporarily.

11. Lessor agrees at its own cost and expense to maintain in full force and effect insurance policies insuring the vehicles leased hereunder against the hazards of fire, theft, transportation, tornado, windstorm and earthquake damage.

12. Lessee agrees to provide and maintain in force a policy of Public Liability and Property Damage Insurance for the account of whom it may concern with respect to liability for injuries to third persons and damage resulting from the operation of the vehicles leased hereunder. Such Public Liability and Property Damage insurance policy shall have limits of not less than \$100,000.00 for injury to or death of one person and subject to that limit for each person to a total liability of \$300,000.00 for all persons injured or killed in the same accident and shall also have a limit of \$100,000.00 for damage, destruction and/or loss of use of property of third persons as a result of any one accident.

13. Lessee agrees that its drivers, servants and agents will cooperate fully with Lessor and the Insurance Carriers insuring the hazards enumerated in Paragraphs 11 and 12 in the investigation and defense of any and all claims or suits arising from the operation of the vehicles leased hereunder and will cause its drivers, Servants and Agents to make prompt report to Lessor of the occurrence of any and all accidents or collisions which occur while [fol. 298-12] the vehicles leased hereunder are in the custody and control of Lessee or its drivers, agents, or servants, with the fullest information available regarding the time, place and nature of the accident or damage together with list of persons injured and owners of property damaged as well as complete a list of witnesses as it is possible to secure. Lessee agrees to promptly deliver to Lessor or such other person or company as Lessor shall have designated in writing, any and all papers, notices and documents whatsoever served upon or delivered to Lessee or Lessee's servants, agents or employees in connection with any claim, suit, ac-

tion or proceeding at Law or in equity commenced or threatened against Lessee and/or Lessor arising out of Lessee's operation of any of the vehicles leased hereunder.

14. All vehicles leased to Lessee under this Agreement shall be operated only by safe, careful and licensed drivers to be selected, employed, controlled and paid by Lessee, said drivers being conclusively presumed to be the agent of Lessee only and Lessee shall require said drivers to operate such vehicles with reasonable care and diligence and to use every reasonable precaution to prevent loss or damage to any of said vehicles because of fire, theft, collision or injury to third persons or property of third persons and upon written complaint from Lessor specifying any reckless, careless or abusive handling of any vehicles leased hereunder, Lessee shall remove such driver or drivers and substitute therefore, careful and safe drivers as soon as it is reasonably possible so to do.

15. Lessee agrees that none of the vehicles leased hereunder will, while in the possession, custody or control of Lessee, be loaded beyond their respective rating service capacity as specified in Schedule "A". In the event any of the said vehicles be overloaded to the extent of twenty (20) percent or more of their respective rated capacity as specified in Schedule "A", such overloading shall be at Lessee's risk and expense, and Lessee agrees that in the [fol. 298-13] event any of said vehicles be damaged in any manner while so overloaded, Lessee shall immediately pay Lessor the amount of any and all such damage.

Lessee agrees not to permit any of the vehicles leased hereunder to be used in violation of any Federal, State or Municipal Statutes, Laws or Ordinance, Rule or Regulation applicable to the operation of such motor vehicle and will hold Lessor harmless from any and/or all fines, forfeitures, or penalties for traffic violation or for the violation of any Statute, Law, Ordinance, Rule or Regulation of any duly constituted public authority.

16. Lessee agrees that upon the expiration of the period for which any vehicles delivered under this Agreement respectively shall have been leased or upon the cancellation or termination of this Agreement, all of the vehicles delivered under this Agreement to Lessee will be returned

to the Lessor at the garage at which such delivery shall have been made (or such other garage in the same city as may have been designated by Lessor), in as good mechanical condition and running order as they were when received by Lessee, ordinary wear and tear expected.

17. Lessor shall incur no liability to Lessee for failure to supply any vehicle, repair any disabled vehicle or supply any vehicle in exchange for another as this Agreement provides, if such failure shall have resulted from fire, riot, strike or other labor troubles or Acts of God, or any other cause or causes beyond control of Lessor, but in such event and during the period of such failure only the rental charges specified in this Agreement shall abate.

18. This contract shall continue for a period of three (3) years from the date of execution thereof; and the Lessee shall have the option to renew said contract for an additional period of three (3) years, provided notice of its intention so to do is served upon the Lessor at least thirty (30) days prior to the expiration of this contract.

19. This Agreement has been executed in duplicate, each of which shall be deemed to be an original.

[fol. 298-14] In witness whereof, Parties hereto have set their hands and seals, this — day of —, 1949.

Gray Bros., Inc., By — —, Its President.
— —, Its Secretary.

Lloyd A. Fry Roofing Company, By Lloyd A. Fry.
Lloyd A. Fry, Jr., Its Secretary. (Seal.)

STATE OF MISSOURI

Before me, the undersigned, a Notary Public, for said County and State, on this — day of —, 1949, personally appeared — — to me known to be the identical person who executed the within and foregoing Instrument and acknowledged to me that — executed the same as — free and voluntary act and deed and for the uses and purposes therein set forth.

— —, Notary Public. My Commission expires:

STATE OF ILLINOIS,

County of Cook, ss.

Before me, the undersigned, a Notary Public, for said County and State, on this 25th day of October, 1949, personally appeared Lloyd A. Fry to me known to be the identical person who executed the within and foregoing Instrument and acknowledged to me that he executed the same as a free and voluntary act and deed and for the uses and purposes therein set forth.

Ethel Klink, Notary Public. My Commission expires: Jan. 25, 1953. (Seal.)

[fol. 298-15]

Schedule "A"

List of Equipment Referred to in Annexed Contract:

Type	Name	Serial Number	Capacity
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[fol. 298-16]

EXHIBIT 2

Agreement

This Agreement made and entered into this — day of —, 1949, by and between —, hereinafter referred to as Party of the First Part, and —, hereinafter referred to as Party of the Second part, witnesseth

Whereas, the Party of the First Part is engaged in the business of leasing truck tractor and trailer units to large industrial concerns. Said industrial concerns haul their own products and furnish their own driver and their own public liability insurance and property damage insurance. Such public liability and property damage insurance policy shall have limits of not less than \$100,000.00 for injury to or death of one person and subject to that limit for each person to a total liability of \$300,000.00 for all persons injured or killed in the same accident and shall also have a limit of \$100,000.00 for damage, destruction and/or loss of use of property of third persons as a result of any one accident. The Party of the First

Part furnishes the trailer and rents the truck-tractor from a driver-owner who is able to obtain and retain employment as driver of his own tractor with the concern that leases these units. The Party of the First Part is responsible for the leasing of the entire units, also supervises the maintenance, and

Whereas, the Party of the Second Part, driver-owner, is the owner of a lawfully licenses truck tractor or holds sufficient equity therein to lawfully lease same tractor to Party of the First Part. Said driver-owner must have sufficient experience in the operation of truck-tractor and [fol. 98-17] trailer units to, through his own effort and initiative, be able to obtain and retain (during the life of this agreement) the status of truck-tractor driver on the tractor he leases the Part of the First Part with the concern the Party of the First Part leases his tractor to. It is understood that the Party of the First Part will in no way have anything to do with the selections, directions or control of drivers.

It is therefore mutually agreed as follows:

The Party of the First Part agrees to lease and does lease from the Party of the Second Part one truck-tractor herein described:

Make	Year	Motor No.
Model	Serial No.	State and License No.
Weight Complete		

It is further understood by and between the Parties hereto that the minimum specifications of the above truck-tractor are adequate properly to perform and to handle any load assigned to it for transportation. It is further understood that the Party of the Second Part must arrange with the industrial concern, Party of the First Part leases to, drive his own tractor, or this entered agreement is cancelled immediately. The Party of the First Part further agrees to furnish truck tractor fully equipped to pull trailer to the Party of the First Part, said tractor controls must be able to operate by both air or vacuum brakes on trailer extra equipment must include fifth wheel, extra gas tank and all necessary safety equipment.

The Party of the First Part agrees to lease the above

truck tractor equipment to responsible concerns under long term lease and this tractor will become part of unit under lease agreement.

[fol. 298-18] The Party of the First Part agrees to pay as rental for truck tractor at the sum of — per mile as recorded on speedometer, and will pay on Thursday of each week the entire amount due on truck tractor rental for the preceding week.

The Party of the Second Part agrees for and in consideration of terms herein set forth that the possession, use and control of the aforementioned truck tractor as above described licensed and registered is hereby vested entirely and exclusively in any concern Party of the First Part chooses to lease to.

The Party of the Second Part agrees to permit said truck tractor to be operated at all times in accordance with the provisions of any applicable oral or written agreement between the Party of the First Part and the concern leasing the equipment.

The Party of the Second Part agrees to properly maintain said truck tractor in good and efficient working order at all times subject to the approval of the Party of the First Part and to pay his sole cost and expenses for all gasoline, tires, replacement parts, repairs of any kind and expenses arising out of the ownership of the said truck tractor, including all necessary license road mileage tax and registration fees; and upon failure to do any of these things the Party of the First Part may, but is not required so to do, pay license road mileage tax, register or maintain said truck tractor in good and efficient working order and may charge the cost thereof including a proper allowance for administrative overhead cost to the Party of the Second Part who hereby agrees to promptly reimburse the Party of the First Part for all such cost on demand. The Party of the Second Part will not charge purchases of any nature whatsoever to the account of the Party of the First Part or any concern Party of the First Part leases to and that the [fol. 298-19] Party of the Second Part has not the authority or permission to make such charges.

The Party of the Second Part agrees to paint said truck

tractor or cause it to be painted and properly maintained at his own expenses in the color and manner with the insignia, figures, symbols or names as may be designated by the Party of the First Part; also to keep truck tractor washed, cleaned or polished.

The Party of the Second Part agrees to obtain and have in effect at all times proper and sufficient, fire, theft and collision insurance to cover said truck tractor and its accessories, and in the event Party of the Second Part fails or for any reason does not have such coverage in effect, the Party of the First Part shall not be liable to Party of the Second Part or any of his creditors.

The Party of the Second Part agrees to provide, keep and maintain on said truck-tractor at all times proper safety equipment as described by the rules and regulations of the Interstate Commerce Commission or any other regulatory body.

The Party of the Second Part agrees to pay the Party of the First Part for any damage to their trailers caused by truck-tractors defective brakes or steering mechanism or any defect of tractor not directly chargeable to the driver of the tractor. If the Party of the First Part is unable to use said truck tractor because of lockouts, strikes or any cause or condition beyond the control of the Party of the First Part, no liability, compensation or amounts due of any kind shall accrue to the benefit or credit of the Party of the Second Part during such time or period.

It is mutually agreed by both parties insofar as the operation of the said truck-trailer are applicable that all of the provisions, conditions and covenants of this agree-[fol. 298-20] ment shall be governed by and subject to the provisions and conditions and covenants contained in any agreement entered in between the Party of the First Part and concern leasing this equipment; any agreements now in force and effect may hereafter be amended or renewed by a like agreement, the terms and conditions will be known to the Party of the Second Part.

In the event that the Party of the Second Part refuses, or, through no fault of Party of the First Part, is unable to completely perform and carry out his part of the agree-

ment, the Party of the First Part may declare this agreement cancelled forthwith as hereinafter provided, and that the Party of the First Part is hereby authorized to withhold all monies due the Party of the Second Part for the rental of truck-tractor under this agreement for a period of sixty days from date of cancellation to be applied against any and all debts, accounts, contracts, damages, causes of action, judgments, claims and damages whatsoever arising from such refusal or failure on the part of the Party of the Second Part to fulfill any and all of the terms of this agreement.

It is further mutually agreed that this agreement shall become effective upon the signing and execution hereof and shall remain in full force and effect for three years starting November 1, 1949 with an automatic renewal for a period of three years unless terminated by the Party of the First Part fifteen days prior to the expiration. However, if the Party of the Second Part fails or neglects to perform in accordance with any and all terms and conditions of this agreement, then in that event the Party of the First Part may immediately terminate this agreement upon written notice to Party of the Second Part with such reason stated therein, otherwise this agreement shall remain in [fol: 298-21] full force and effect except as otherwise provided herein until voluntarily cancelled by either of the parties herein by giving the other a five-day written notice of the desire to cancel.

This Agreement has been executed in duplicate each of which shall be deemed to be an original.

It witness whereof, the parties hereto have set their hands and seals on the day and year first above written.

_____, _____

[fol. 299] Registered Mail
Return Receipt Requested

515 East Second St.
February 16, 1950

Mr. E. J. Eldridge, G. T. M.
Lloyd A. Fry Roofing Company
Summit, Illinois.

Dear Mr. Eldridge:

At our conference held at the Arkansas Public Service Commission offices on January 26, 1950, for the purpose of discussing the arrangement employed by you whereby trucks are transporting your company's product in interstate commerce, I promised to inform you of the position to be taken by our Bureau of Motor Carriers in relation to said arrangement.

I am now informed that our Bureau believes the transportation being performed is of a "for hire" nature and should be continued only under appropriate authority of the Interstate Commerce Commission, and in full compliance with its rules and regulations.

I desire to inform you by this letter that a continuation of the transportation under the arrangement evidenced by the "Leasing agreement" entered into between Lloyd A. Fry Roofing Company, a corporation, and Frank E. Whittington Co., dated September 30, 1949, supplemented by verbal understandings involving conditions of employment of truck drivers, will be at the peril of the parties.

In a number of instances shippers have been charged and convicted in criminal proceedings as aiders and abettors for knowingly engaging the services of unauthorized motor carriers or motor carriers who have not filed rates.

The Bureau solicits your cooperation in the enforcement of the Interstate Commerce Act. An acknowledgment of this letter will be appreciated.

Very truly yours, R. K. Hagarty, District Director.

I hereby certify that this is a true copy of a carbon copy of letter in the file of the District Office.

R. K. Hagarty, 10/12/50.

CC: Mr. Frank E. Whittington, Dist. Dir. Purse—2, Dist. Dir. Childs—2, Dist. Dir. Craig—2, Dist. Dir. Miller—2.

[fol. 300]

207 Post Office Building
Memphis 3, Tennessee
March 17, 1950

Registered Mail—Return
Receipt Requested

Refer to L&E
7B-522

Mr. A. D. Hollingsworth
3796 Gamewell Road (residence)
Memphis, Tennessee

Dear Mr. Hollingsworth:

Investigation made by this Bureau indicates that you have under lease to Mr. Frank Whittington, Memphis, Tennessee, motor vehicles which are sub-leased to Lloyd A. Fry Roofing Company by Mr. Whittington and used in transporting property of Lloyd A. Fry Roofing Company in interstate commerce. The investigation further indicates that you are employed as a driver of this equipment.

This particular arrangement has been under consideration by the Bureau of Motor Carriers and I am now informed that our Bureau believes the transportation being performed is of a "for-hire" nature and should be continued only under appropriate authority of the Interstate Commerce Commission and in full compliance with its rules and regulations.

I desire to inform you that a continuation of the afore-said transportation under the present leasing arrangement will be at your own peril and that of all parties involved.

The Interstate Commerce Act provides rather heavy penalties for violations and in many instances motor car-

riers have been charged and convicted in criminal proceedings for operating in violation of the Act and the Commission's regulations.

Should you care to discuss this matter with me or if there is any further information you desire with respect to the provisions of the Interstate Commerce Act, please feel free to call upon me.

An acknowledgement of this letter will be appreciated.

Yours very truly, W. F. Goodwin, District Supervisor.

I hereby certify that this is a true copy of a carbon copy of a letter in the file of the District Office.

R. K. Hagarty.

CC: Mr. Frank Whittington, Rt. 1, Box 384, Memphis, Tennessee.

cc: District Directors Hagarty and Craig.

[fol. 301] IN THE PULASKI CHANCERY COURT

[Title omitted]

FINAL DECREE—Filed April 16, 1951

On this day this cause came on to be heard, and was submitted to the Court upon the pleadings, depositions, evidence adduced in open court, the briefs and argument of counsel, and, being well and sufficiently advised, the Court doth find:

Complainant, a corporation, with manufacturing plants in a number of States, is engaged in the manufacture and distribution of asphalt roofing products. It has a plant at Memphis, Tennessee, from which point it sells and distributes its merchandise in a number of States, including points in the State of Arkansas.

The defendants are the duly constituted representatives of the State of Arkansas, empowered by statutory authority to administer Act 367 of 1941, the Arkansas Motor Carrier Act, 1941.

On or about the first day of November, 1949, complainant determined to change its method of selling and distributing its merchandise, adopting features of both the zone delivered price method and the multiple basing point method of pricing, quoting its merchandise at a delivered destination price, and resolved, as well, in order to successfully activate this method, to transport its own products by use of a fleet of motor vehicle equipment leased and operated by complainant.

[fol. 302] Frank Whittington, Inc., located at Memphis, Tennessee, is engaged in maintaining and leasing motor vehicle equipment to a number of industrial concerns. Under the terms of a long-term lease, Frank Whittington, Inc., contracted to furnish to complainant certain described tractor and semi-trailer units, pay the cost of operation thereof, and to maintain same, being compensated therefor upon the basis of a fixed price per running mile. By agreement of the parties, the equipment list constituting a part of the lease as originally executed was changed from time to time.

All trailers leased to complainant were owned by Frank Whittington, Inc., and this company owned, as well, approximately fifty per cent of the tractors leased to complainant. The remainder of the tractors leased by Frank Whittington, Inc., to complainant had previously been leased by Frank Whittington, Inc. from individual owners of such tractors under the terms of long-term written leases, the owners thereof being compensated for use of the tractors on the basis of a stipulated sum per running mile, such compensation being paid by Frank Whittington, Inc. The owners of these tractors were employed by complainant as truck drivers in some instances before they owned tractors and, in other instances, after such ownership.

Irrespective of whether an applicant for employment owned or did not own a tractor, the employment method utilized by complainant and subsequent direction and control of the truck-driver employee was identical in every particular. No representative of Frank Whittington, Inc., directly or indirectly, furnished truck drivers to complainant. Exclusive direction and control of leased equipment, as well as of the drivers thereof, was

vested in and exercised by complainant. Frank Whittington, Inc. had nothing to do with the selection or employment of drivers by complainant, nor with any of the conditions and practices surrounding their employment; and neither do Frank Whittington, Inc., nor the truck drivers, have, or exercise, any control over when or where leased equipment will be operated; by whom same will be driven; or the goods to be transported thereby.

Drivers employed by complainant at Memphis constitute twelve out of one hundred seventy-five employees; they report solely to complainant; they participate in all employee benefit programs of complainant, including Workmen's Compensation, and Group Health and Life Insurance; vacations with pay, etc.; Social Security and Withholding Tax deductions are made from their earnings by complainant.

Neither lessor nor truck drivers are responsible for the safety of, or damage to, cargo transported in leased equipment; public liability and property damage insurance and license plates covering the operation thereof are purchased and paid for by complainant; all equipment leased by complainant is clearly lettered to the effect that it is being used solely in the conduct of complainant's business and is not for hire; and, during the time any vehicle is under lease to complainant, it is used exclusively by complainant.

Complainant has found that substantial advantages result from assigning each truck driver to the operation of a particular piece of equipment and, in so far as is possible, if a driver owns a tractor which has been leased to complainant, an effort is made to assign him thereto. On the other hand, there is no obligation on complainant so to do and drivers, as occasion demands, are assigned to the driving of equipment other than that owned by them.

Neither the wages paid by complainant to its truck drivers, nor the rental paid for leased equipment, is dependent upon the type, quantity or character of merchandise transported.

All goods transported by complainant are owned by it with the exception that, on occasion of a back-haul, raw materials of Volney Felt Mills, Inc. will be transported to Memphis. Volney Felt Mills, Inc. is a wholly-owned sub-

subsidiary of Lloyd A. Fry Roofing Company, occupies the same plant at Memphis, and is managed by the same personnel managing operations of Lloyd A. Fry Roofing Company. No charge is made to Volney Felt Mills, Inc. for transportation performed on its behalf by Lloyd A. Fry Roofing Company.

In so far as the State of Arkansas is concerned, all transportation performed by complainant is interstate transportation.

Neither weigh-bills, nor bills of lading, are used by complainant in making delivery of its merchandise, and its customers are not billed for transportation charges as a separate item although, in some instances, a portion of the cost of transportation is included in the delivered price quoted and collected.

From the date of inception of the existing system until the end of August, 1950, the transportation cost to complainant of delivering its merchandise by leased equipment from the Memphis establishment totaled approximately six per cent of gross revenue, and during this period by using this method of delivery, complainant suffered a deficit of Fourteen Thousand (\$14,000.00) Dollars. In the opinion of [fol. 305] complainant, however, numerous advantages, resulting to complainant and its customers, merited a continuation of the system.

The primary purpose and business of the Lloyd A. Fry Roofing Company is to manufacture and distribute asphalt roofing products, and not to perform transportation for a profit.

Neither complainant, its truck drivers, nor lessors of the equipment used by complainant held a certificate or permit from the Arkansas Public Service Commission, authorizing the performance of a transportation service in the State of Arkansas. Conceiving that the leasing of Motor vehicles and the performance of transportation, as above, was not private carriage and was subject to regulation by the State of Arkansas, defendants, through their authorized representatives began the arrest and prosecution of complainant's truck drivers, and of lessors from whom complainant obtained its motor vehicle equipment, preventing complainant from making delivery of its merchandise and fulfilling its contracts in Arkansas. By tem-

porary restraining order entered herein, pending criminal proceedings were stayed and further arrests enjoined until disposition of this cause. It is the plan and purpose of the defendants to resume such arrests and prosecutions, unless permanently enjoined therefrom, and, thereby, complainant would suffer irreparable injury.

The leasing of motor vehicle equipment and the use thereof by complainant in the manner and for the purposes set forth above is not subject to regulation by the Arkansas Public Service Commission under and by virtue of the Arkansas Motor Carrier Act, Act 367 of 1941, except in so far as hours of service, weight restrictions and safety regulations are concerned, in that the leasing and maintenance of motor vehicles and equipment involved herein is not the furnishing of transportation, and, in the use of such motor vehicle equipment by complainant in manner above described, complainant is performing private, as distinguished from common or contract carriage.

It is, therefore, ordered, adjudged, and decreed by the court that the defendants herein, their successors, agents, servants, employees, attorneys and enforcement officers be and they hereby are permanently restrained and enjoined from molesting, interfering with, or instituting, prosecuting or maintaining, or inciting or aiding therein, of any criminal action against the plaintiff, lessors of motor vehicle equipment to plaintiff, or any of their agents, servants, employees and drivers, under and by virtue of the Arkansas Motor Carrier Act, Act 367 of 1941, in the performance of, or resulting from, the leasing of motor vehicle equipment and the transportation by complainant therein in interstate commerce of merchandise owned by complainant, or its wholly-owned subsidiary, Volney Felt Mills, Inc., except in so far as hours of service, weight restrictions and safety regulations are concerned.

To which findings and judgment herein, the defendants except pray an appeal to the Supreme Court of Arkansas, which appeal is granted.

E. R. Parham, Special Chancellor, Pulaski Chancery Court.

Dated: 4-16-51.

[File endorsement omitted.]

[fol. 307] REPORTER'S CERTIFICATE (omitted in printing)

[fol. 308] IN THE PULASKI CHANCERY COURT

[Title omitted]

ORDER—May 15, 1951

On this day comes W. Charles Webster, the Court Reporter designated by the Court and the parties to report the oral testimony of the witnesses and other proceedings had in this cause on September 6, 1950, a day of the April Term, 1950, and October 11, 1950, a day of the October Term, 1950, and who was instructed, in event of appeal, as per rule of this Court, to prepare a full and accurate record of the testimony and other proceedings and to attach thereto all exhibits, or copies thereof, to be submitted to the Court for approval within six months from the date of the filing of the decree herein; and said transcript of the testimony and other proceedings are now presented to the Court by said Reporter, and having been examined by the Court and found to be correct in all things, are approved and ordered filed as the Bill of Exceptions, or as a part of the record in this cause.

Date: May 15, 1951,

E. R. Parham, Special Chancellor.

[fol. 309] IN THE PULASKI CHANCERY COURT

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 310] IN SUPREME COURT OF ARKANSAS

No. 9597

ARKANSAS PUBLIC SERVICE COMMISSION

v.

LLOYD A. FRY ROOFING CO.

APPEAL FROM PULASKI CHANCERY COURT REVERSED AND
DISMISSED, MAJORITY OPINION—November 19, 1951

Paul Ward, Associate Justice

On November the 29th, 1949, the enforcement officers of appellant, Arkansas Public Service Commission, acting in accordance with their authority and duty, as they saw it under Act 367 of 1941, stopped a truck which bore a Tennessee license and was driven by one J. P. Boshers. The truck (and the trailer attached) had appellee's name on it and (presumably) contained merchandise belonging to or being delivered for appellee. Boshers informed the officers that he owned the truck but he had leased it to one Frank Whittington who had in turn leased it to appellee and that appellee had employed him to drive it. Thereupon said officers arrested the driver for violation of the aforementioned Act in that neither he nor Whittington held a permit or Certificate of Convenience and Necessity from the Arkansas Public Service Commission. Twice on January 24th and May 2nd, 1950, respectively, three other truck drivers were arrested under the same facts and circumstances and in each instance bond was posted and there has been no trial. Then on June 2nd, 1950, upon application by appellee, the lower court issued a temporary order restraining appellant, its agents and employees from further so interfering with appellee, its drivers and agents. Following this, on June 26th and July 6th, 1950, respectively, two other truck drivers were stopped under the same facts and circumstances but no arrests were made because of the said court order.

After a full hearing on the issues a special chancellor

rendered a decree, April 16, 1951, making the temporary [fol. 311] order final, from which decree appellant prosecutes this appeal.

It is our view that if the truck drivers are required to have a certificate as stated above then the issuance of the restraining order was erroneous, otherwise it was proper and the case should be affirmed. Under this view and in this opinion we do not consider the status of Whittington in his relation to the provisions of said Act. Again, if the truck drivers are required to have a permit then it is necessary for us to find that said drivers are *contract carriers* under the provisions of said Act 367. To determine this it becomes necessary to consider the appropriate language of the Act and also the testimony, with the exhibits, introduced in evidence.

Section 5 (a) (8) of said Act reads as follows:

"The term 'contract carrier by motor vehicle' means any person, not a common carrier included under Paragraph 7, Section 5 (a) of this Act, who or which, under individual contracts or agreements, and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation."

A careful reading of the above language gives the impression that the drafters intended the definition of *contract carrier* to be all inclusive and to be proof against easy evasion.

Much of the testimony introduced at the hearing below need not be recounted or considered, under our view of the matter, because the lease agreements between the drivers and Whittington and the lease agreement between Whittington and appellee fairly well established the relationship of each with the others, so these agreements or leases will be freely referred to hereinafter.

Appellee is a corporation domiciled in Memphis, Tennessee, and is engaged in the manufacture and sale of asphalt roofing products. From its plant in Memphis it sells and distributes its products to customers located in a number of points in Arkansas and other states.

About a year previous to the first arrest mentioned above appellee adopted a new policy of delivering its products to customers by means of tractor-trailer equipment, which [fol. 312] it leased from Whittington but which was to be driven by its own employees. Apparently Whittington was in the business of leasing tractors and trailers to concerns like appellee but in so far as it affects this case he owned seven tractors and eighteen trailers which he leased to appellee, but he also purported to lease to appellee five other tractors which were owned by the drivers mentioned above as having been arrested or stopped. It is these five owner-drivers that we are concerned with here.

Appellee says it has a right to lease transportation equipment and hire its own drivers and thereby become a private carrier just as it would, concededly, be if it owned said equipment outright, and, as a general proposition, we think this is true. On the other hand, appellant contends that the said lease agreements are not bona fide but are in effect a clever attempt to evade the provisions of said Act 367 which requires *contract carriers* to procure a permit from the commission. The implication of appellee, of course, is that if it is a private carrier then the owner-drivers could not be *contract carriers*.

The lease agreement between the owner-drivers and Whittington in force when the first two arrests were made contains among other provisions, the following:

Whittington (a) is engaged in business of leasing truck tractors and trailers to large industrial concerns; (b) the industrial concerns have their own products and furnish their own drivers and liability insurance; (c) shall have nothing to do with selection, direction or control of drivers; (d) is to lease truck to responsible concerns for long terms; (e) is to pay nine cents per mile as shown by speedometer. The owner-driver of the truck (a) shall be able to obtain and retain employment as driver of his own tractor with the concern to whom Whittington leases it; (b) must own tractor and have sufficient experience to be able to obtain and retain his job during life of lease; (c) must arrange to drive own truck or lease is cancelled immediately; (d) agrees his truck shall be operated in accordance with any

[fol. 313] written or *oral* agreement between Whittington and appellee; (e) agrees to pay for all gasoline, tires, replacements, repairs, licenses, road mileage tax, and registration fees, provide fire, theft and collision insurance, wash, clean and polish tractor, and paint it in any manner designated by Whittington; (f) agrees that this lease shall be governed to any agreement between Whittington and appellee. The lease agreement provides it shall remain in full force and effect for three years, but also provided *either party may cancel by giving the other five days written notice.*

It appears that sometime later Whittington changed the form of the lease agreement to be used between himself and the tractor owners, and a copy is contained in the record. It is substantially the same as the one mentioned above except that it does not require the tractor owner to obtain and maintain a job with appellee to drive his own truck, and also the cancellation notice is changed from five to 30 days. Here we note that the name of appellee is not mentioned in any of these leases but we used it for convenient reference to anyone to whom Whittington might lease the tractors.

In the lease agreement between Whittington and appellee, Whittington agrees to service the tractors in substantially all respects as is required of the owner in the leases mentioned above. This lease runs for a definite period of three years but gives Whittington the right to substitute vehicles and gives appellee the right to secure vehicles from other sources if Whittington cannot furnish them. Whittington testified that in every instance where he leased a tractor from the owner and released it to appellee, the owner was employed by appellee to drive the same. It also appears that Whittington would send the owner to appellee to secure such employment.

In the light of the above we are of the opinion that the driver-owners involved in this litigation were *contract carriers* as defined in the section of Act 367 of 1941 quoted above and that they were therefore required to have a [fol. 314] Certificate of Necessity and Convenience from the Arkansas Public Service Commission. It seems to us that the arrangements made by appellee to deliver its own

products as set forth above amount only to a clever plan to circumvent the letter and spirit of the law. We could not express this view in better language than was used in the case of *Georgia Truck System v. Interstate Commerce Commission*, 123 Fed. (2d) 210, where the court in dealing with a similar situation said:

"... It is true that the contracts, under cover of which the operations were conducted, are in most of their provisions carefully drawn to give color to appellant's claim of renting only, and if the operations had been some question whether the operations so conducted were transportation operations within the invoked act. When, however, the contracts are read in the light of the construction accorded them by the parties by the actual operations under them, it is clear that the scheme as a whole is a mere subterfuge, an unpermitted evasion, not a real avoidance of the provisions of the law."

It is apparent that appellee seeks to obtain all the obvious advantages of having its products delivered by trucks driven and maintained by the owners thereof without complying with the Arkansas law regulating contract carriers, but if this arrangement is approved and carried to its ultimate possibilities it could have the affect of destroying a sizeable industry. The fact that Whittington is interposed between the tractor owners and appellee makes no difference because the two sets of lease agreements are too closely tied together to disguise the real purpose and intent, and because we must look to the status of the owner-drivers and to the nature of the service rendered by them. This view is sustained by *Interstate Commerce Commission v. F. And F. Truck Leasing Company*, 78 F. Supp. 13, from which the following is quoted:

"In the court and Commission cases the issue of whether a carrier status subject to regulation on the part of the lessor existed has been determined by how much service which goes with ordinary hauling for compensation was being furnished the shipper in addition to the leased vehicle. Also whether on the whole

the dealings and arrangements between the parties indicate that a transportation service was being rendered by the lessor to the lessee rather than simply furnishing for private operation a vehicle to a shipper, and whether the vehicle was being operated by the shipper in the same manner as would normally obtain if he were the owner of the rented equipment."

Also in *United States v. La Tuff Transfer Service*, 95 F. Supp. 375, appears this language:

[fol. 315] "Motor carrier operations must be *bona fide* and conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Any plan or scheme, whether by purported lease, agency, or other device disguising the nature of the transportation will be of no avail for that purpose. Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier."

Other cases expressing similar views are: *Board of Railroad Commissioners v. Reed*, 58 P. (2d) 271; and *Louisville Taxicab and Transfer Co. v. Blanton*, (Ky.), 202 S. W. (2d) 433.

Although appellant makes it clear it in no way contends that appellee is subject to said Act 367, yet appellee attempts to show that it is a *private carrier* and therefore it must follow that the owner-drivers, being its employees, could not be subject to the Act. In support of this it is pointed out that it carries said drivers as employees, pays social security taxes on them, extends to them vacation benefits, etc., and has absolute control over them. It is ably urged that the "Primary Business Test" is the proper rule by which appellee's status should be governed, and cites at length from rulings of the Interstate Commerce Commission which it says are not binding but should be persuasive to this court. Among such rulings is cited the case of *Lenoir Chair Co.-Contract Car-*

rier Application, 48 Motor Carrier Cases 259, and *Schenley Distiller's Corporation-Contract Carrier Application*, 48 Motor Carrier Cases 405. Without finding fault with the "Primary Business Test" rule as explained and applied in cited rulings we think such rule is not the one to apply here, and that said rulings do not control here for the obvious reason that the fact situation obtaining here did not exist there.

Considering alone the wording of the first mentioned lease agreement between the owner-drivers and Whittington it is perfectly clear that the tractors leased to Whittington (and later leased to appellee) were to be driven by the owners, and it is just as clear that the lease of the tractors to appellee was not bona fide. In fact it amounted to no effective lease at all because, first, the lease to Whittington terminated when and if the owners were unable to drive their own trucks and, second, the lease could be terminated with cause, on five days notice. In either event the tractor could be withdrawn from appellee. This negates the contention of appellee that it was operating under a bona fide lease for long periods of time. Little need be said about the second form of lease contract devised after the first arrests were made which eliminated the requirement that the owners should drive the tractors and extended the cancellation time from five to 30 days. In the first place the "thirty days" does not harmonize with appellee's contention of long term lease agreements, and more significant is the fact that in each instance involved here the owner was the driver. Also the fact that the lease form was changed at the time and under the circumstances is itself significant.

For the reasons set forth above the decree of the lower court is reversed, the injunction is dissolved and the cause of action dismissed.

Holt, J., and George Rose Smith, J., Dissent.

GEORGE ROSE SMITH, Associate Justice

George Rose Smith, J., dissenting. The case presents a question of fact, and I am not able to say that the chancellor was wrong in deciding it as he did. It is possible for the owner of a truck to lease it to another and then obtain employment as its driver without thereby becoming a contract carrier. If the arrangement is bona fide, as it was found to be in *Watson Mfg. Co., Inc., Common Carrier Application*, 51 M. C. C. 223, there is no violation of the law.

In the case at bar the arrangements by which the driver-owners are employed by the appellee may or may not have been made in good faith, and I am not willing to say that the mere contracts themselves, without other evidence, amount to a subterfuge. If it were shown that the appellee does not in fact exercise the control over the driver-owners that it normally would exercise over an employee, or if it were shown that the amounts paid for the use of these tractors are such as to be fair compensation for the carriage of goods and not fair compensation for the lease of the equipment, or if some other showing were made to indicate bad faith, then, I should agree with the majority. But on this record I think the appellee made *prima facie* proof of a valid arrangement, and the Commission failed to sustain the burden of going forward with the evidence to show that the arrangement is in fact a sham. I would, however, modify the injunction to make it less broad in its terms.

[fol. 318] IN SUPREME COURT OF ARKANSAS, MAY TERM,
1951

#9597

ARKANSAS PUBLIC SERVICE COMMISSION, Appellant,

v.

LLOYD A. FRY ROOFING COMPANY, Appellee

Appeal from Pulaski Chancery Court, First Division

JUDGMENT—November 19, 1951.

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, First Division, and was argued by solicitors, on consideration whereof, is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The court erred in granting the restraining order against appellant.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered by, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs and that the injunction herein be dissolved, and the cause of action dismissed.

It is further ordered and decreed that said appellant recover of said appellee all its costs in this court and the court below in this cause expended, and have execution thereof.

Holt and George Rose Smith, JJ., dissent.

[fol. 318a] [File endorsement omitted.]

IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed December 19, 1951

Comes Lloyd A. Fry Roofing Company, appellee, and respectfully petitions the court to rehear the above cause, upon the following grounds, to-wit:

I

The court erred in premitting the question that appellee is being deprived of its property without due process of law, contrary to the Constitution of the United States.

II

The court erred in premitting the question that the action of appellant and the proposed application of the Arkansas Motor Carrier Act unduly burdens and destroys interstate commerce.

[fol. 318b]

III

The court erred in premitting the question that the only transportation involved is interstate transportation and in failing to recognize that the Congress of the United States has completely pre-empted the field of interstate contract motor carrier transportation.

IV

The court erred in not recognizing that the only contract or permit which could be granted by the Arkansas Public Service Commission would be for the performance of intrastate transportation, and that the Arkansas Public Service Commission would be powerless to grant a certificate or permit covering the interstate transportation involved in this proceeding, even though application therefor had been made by appellee or its drivers.

V

The court erred in premitting the question whether a bona fide employer-employee relationship existed between the Lloyd A. Fry Roofing Company and its truck-drivers, irrespective of whether they owned tractors leased by Whittington to such company.

VI

The court erred in not recognizing that the injunction of the court below is prospective in effect, and in predicated its opinion upon its analysis of a lease agreement between Whittington and owners of tractors to which Fry was not a party, and which had been abandoned and [fol 318c] superseded prior to the granting of the temporary restraining order and the injunction in this cause.

VII

The court erred in premitting the question whether the Lloyd A. Fry Roofing Company is a private carrier, and in not holding that such company is a private carrier.

VIII

The court erred in not holding that motor transportation could not at one and the same time be both private and contract carriage.

IX

The court erred in refusing to consider the "primary business test" applicable to a determination of the issues in the case at bar.

X

The court erred in premitting the question and in ignoring the fact that exclusive direction and control of all motor vehicle equipment and drivers thereof was had and exercised by the Lloyd A. Fry Roofing Company, irrespective of ownership of such equipment.

XI

The court erred in premitting the question whether actual operations were in complete compliance with the

terms and provisions of equipment leases, and in not holding that the provisions of such leases were carried out in detail.

[fol. 318d]

XII

The court erred in considering ownership of motor vehicle equipment to be determinative of the question of private as distinguished from contract carriage, rather than the actual direction, control and use of such equipment.

XIII

The court erred in finding that the transportation method adopted and employed by appellee was for the purpose of avoiding compliance with the Arkansas Motor Carrier Act in that the record contains not one iota of evidence to support such finding.

XIV

The court erred in holding that the leases of equipment to appellee were not bona fide leases in that the record contains not one iota of evidence to support such finding.

XV

The court erred in holding that by virtue of ownership of tractors the drivers employed by Lloyd A. Fry Roofing Company became contract carriers.

XVI

The court erred in holding that the Lloyd A. Fry Roofing Company could not employ as truck drivers owners of motor vehicle equipment leased by Fry as drivers thereof, under the circumstances and leases involved in this cause, without a certificate of public convenience and necessity being procured from the Arkansas Public Service Commission.

[fol. 318e]

XVII

The court erred in ignoring the decision of the three-judge United States District Court, affirmed per curiam by the United States Supreme Court, in *Brooks Transportation Company et al. v. United States of America et al.*, 93

F. Supp. 517, 95; in *Watson Manufacturing Company, Inc.*, Common Carrier Application, 51 M. C. C. 223, as well as the admonition of the Supreme Court of the United States as to the weight to be given to the decisions of the Interstate Commerce Commission in matters involving interstate transportation. *United States et al v. American Trucking Association*, 310 U. S. 534, 60 S. Ct. 1059; *Levinson v. Specter Motor Company*, 330 U. S. 649.

XVIII

The court erred in finding:

"Whittington testified that in every instance where he leased a tractor from the owner and released it to appellee, the owner was employed by appellee to drive the same. It also appears that Whittington would send the owner to appellee to secure such employment."

XIX

The court erred in not holding that the findings of fact of the lower court were supported by substantial evidence, and in not sustaining the decree of the court below.

XX

The court erred in holding that Section 5 (a) (8) of the *Arkansas Motor Carrier Act* is or was intended "to be all-inclusive."

(Certificate omitted in printing.)

[fol. 319] IN SUPREME COURT OF ARKANSAS

PER CURIAM ORDER—January 7, 1952

The petition for rehearing in the case of *Arkansas Public Service Commission v. Lloyd A. Fry Roofing Company*, is by the Court overruled.

[fol. 320] IN SUPREME COURT OF ARKANSAS

[Title omitted]

STIPULATION—Filed January 10, 1952

In this cause it is stipulated and agreed that insofar as operations by appellee in the State of Arkansas by the use of motor vehicle equipment leased by it and operated by its employees who do not own same nor have any interest therein the agreement between the parties entered into in the Chancery Court of Pulaski County, Arkansas, is hereby reiterated and affirmed, such agreement and stipulation to continue until such time as appellee shall have applied for and prosecuted application for writ of certiorari to the Supreme Court of the United States, and until final action thereon by the Supreme Court of the United States.

This the 9th day of January, 1952.

Arkansas Public Service Commission, By: Eugene R. Warren, Attorney.

Lloyd A. Fry Roofing Company, By: Glenn M. Elliott, Attorney.

[File endorsement omitted.]

[fol. 321] IN SUPREME COURT OF ARKANSAS

[Title omitted]

CERTIFICATE AS TO EXISTENCE OF A FEDERAL QUESTION—February 11, 1952

On motion of Lloyd A. Fry Roofing Company, appellee, this Court in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the opinion and per curiam opinion heretofore rendered and made herein, that said appellee properly raised and presented to this Court by brief, oral argument and petition to rehear, the Federal questions that the proposed enforcement and method of enforcement of the Arkansas Motor Carrier Act, Act 367 of the Acts of 1941, Arkansas,

deprived appellee of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that thereby interstate commerce was unduly burdened and destroyed and the Arkansas Public Service Commission was attempting to regulate interstate commerce in a field completely pre-empted by Congress, contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States and Part II of the Interstate Commerce Act, U. S. Code, Title 49, sections 301 et seq; and it became material to the determination of this case in this Court to determine said questions so raised by appellee, which questions were considered and determined by this Court adversely to said appellee, as appears from the entry of per curiam order overruling appellee's petition to rehear.

It is hereby certified that this Court is the highest Court of law and equity in the State of Arkansas in which a decision of this case could be had.

Enter this the 11th day of February, 1952.

[fol. 322] I, Griffin Smith, Chief Justice of the Supreme Court of Arkansas, do hereby approve entry of the foregoing certification as being the action taken and made by the Supreme Court of Arkansas, en banc, on the day and date aforesaid.

Griffin Smith, Chief Justice, Supreme Court of Arkansas.

[fol. 323] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER

In this cause it appearing to the court that a true and correct copy of all pleadings, orders, bonds, stipulations, transcript of testimony and exhibits, and all documents of every character in said cause, has been filed with the Clerk of this court now, therefore, by agreement of the parties and in order to eliminate the expense of recopying the record in this cause it is

Ordered, adjudged and decreed that the Clerk of the Supreme Court of Arkansas be and he hereby is authorized and directed to certify and transmit to the Clerk of the Supreme Court of the United States the originals of all of the foregoing portions of the record in this cause, as well as the originals of all exhibits filed therein, and to certify same as being a complete transcript of all proceedings had in said cause.

Griffin Smith, Chief Justice, Supreme Court of Arkansas.

Approved for Entry:

Arkansas Public Service Commission, By Eugene R. Warren, Attorney.

Lloyd A. Fry Roofing Company, By Glenn M. Elliott, Attorney.

[fol. 324] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PRAECIPE

Comes Lloyd A. Fry Roofing Company, appellee, and designates the following documents, instruments and writings to be certified by the Clerk of the Supreme Court of Arkansas to the Supreme Court of the United States as the record in the above-styled cause:

1. The complaint, with exhibits thereto.
 2. Restraining order and restraining order bond.
 3. Motion to dissolve restraining order and order dissolving same.
 4. Answer of the defendants.
 5. Deposition of Frank E. Whittington with exhibits thereto.
 6. Transcript of the testimony of all witnesses examined in open court and stipulations with reference thereto.
 7. Exhibits nos. 1 through 36, inclusive.
 8. Findings of fact, conclusions of law and decree of the Chancery Court of Pulaski County, Arkansas.
- [fol. 325] 9. Reporter's certificate.

10. Order of May 15, 1951.
11. Clerk's certificate, of May 15, 1951.
12. Opinion of the Supreme Court of Arkansas delivered November 19, 1951, with dissent thereto.
13. Petition for rehearing filed on behalf of appellee.
14. Per curiam order overruling petition for rehearing.
15. Stipulation dated January 9, 1952.
16. Certificate as to existence of a Federal question.
17. Order re: transmission of original record to Supreme Court of the United States.
18. This praecipe.
19. Certificate of the Clerk of the Supreme Court of Arkansas.

James W. Wrape, Glenn M. Elliott, 1804 Sterick Building, Memphis Tennessee, Of Counsel for Appellee.

Certificate of Service (omitted in printing).

[fol. 326] Clerk's Certificate to foregoing transcript omitted in printing.

Judge's Certificate to Clerk (omitted in printing).

[fol. 327] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PORTIONS OF RECORD NOT TO BE PRINTED—
March 4, 1952

Come the parties by counsel and stipulate and agree that the following exhibits constituting a portion of the record certified by the Clerk of the Supreme Court of Arkansas may be omitted in the printing of the record for the Supreme Court of the United States and for the reasons set forth herein:

1. Omit the printing of Exhibits 2, 3, and 4 to the testimony of Leon Hecht inasmuch as Exhibit 1 is representa-

tive of the applications for employment constituting said Exhibits 2, 3, and 4, the only difference being immaterial details with respect to the employment of other individuals.

2. Omit the printing of Exhibits 5, 7, and 8 to the testimony of Leon Hecht by virtue of the fact that Exhibit 6 is representative of applications for fidelity bond, filed by all employees covered by Exhibits 5 through 8, inclusive, the only difference between Exhibit 6 and Exhibits 5, 7, and 8 being immaterial differences with respect to the applications of individual employees in the same category as that of the employee covered by Exhibit 6.

3. Omit from printing Exhibits 9 and 11 to the testimony of Leon Hecht by virtue of the fact that Exhibit 10 is representative of transportation payrolls reflected by said Exhibits, the only difference being with respect to the names of individuals appearing thereon, their earnings and [fol. 328] deductions, same, insofar as here material, showing that the respective drivers who were arrested appeared upon the transportation payrolls of the Lloyd A. Fry Roofing Company as drivers at the times of their arrests.

With respect to Exhibit 12, omit printing all except the first check appearing thereon, being check No. 13924, by virtue of the fact that this payroll check is representative of all other checks appearing on such Exhibit, the only difference being the names of the truck drivers with the amounts earned by them and the amounts of deductions made therefrom.

4. Omit in printing Exhibits 14, 15 and 16 to the testimony of Leon Hecht by virtue of the fact that Exhibit 13 thereto is representative of the driver's daily logs kept by all truck drivers covered by said Exhibits.

5. Omit in printing Exhibits 18, 19 and 20 to the testimony of Leon Hecht by virtue of the fact that Exhibit 17 is representative of delivery tickets being used by all four truck drivers whose arrests are involved in this litigation, the only difference between said Exhibits and Exhibit 13 being the date, quantity and character of merchandise, consignee, and driver.

6. Omit in printing Exhibits Nos. 22, 23, and 24 to the testimony of Leon Hecht by virtue of the fact that Exhibit 21 is representative of the equipment inspection

reports covered by the Exhibits proposed to be omitted, the only difference being date, equipment covered, condition of equipment reflected thereby and name of driver, said reports having been turned in by the respective drivers on the dates of their arrests.

7. Omit in printing Exhibit Nos. 27, 28, 29, and 30 by virtue of the fact that Exhibit No. 26 is representative of all of the equipment leases referred to in the Exhibits proposed to be omitted in printing, the only difference being in date of execution and description of motor vehicle equipment covered thereby.

[fol. 329] Stipulated and agreed this the 4th day of March, 1952.

Lloyd A. Fry Roofing Company, Petitioner, By
Glenn M. Elliott, Attorney.

Arkansas Public Service Commission, et. al, Respondents, By Eugene R. Warren, Attorney.

[fol. 330] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ADDITIONAL STIPULATION AS TO PORTIONS OF RECORD NOT TO
BE PRINTED—March 14, 1952

Come the parties by counsel and in addition to the stipulation heretofore entered into on the 4th day of March, 1952, with respect to portions of record not to be printed in the above-styled cause and stipulate and agree, further, that with respect to the printed "Petition For Rehearing Filed On Behalf of Appellee With Brief And Argument In Support Thereof" appearing at page 318 of the transcript as certified by the Clerk of the Supreme Court of Arkansas, that only the petition for rehearing appearing at pages 1 through 5 of the printed petition, etc., shall be printed as a part of the record for the Supreme Court of the United States; and that the brief and argument in support of such petition, appearing at pages 6 et seq thereof shall be omitted in printing said record for the Supreme Court of the United States.

It is further stipulated and agreed by the parties through counsel that all portions of the record in the courts below which, by agreement of counsel, are not to be printed as a part of the record in the Supreme Court of the United [fol. 331] States, but which have been certified by the Clerk of the Supreme Court of Arkansas to be parts of such record, may be referred to in brief and argument by counsel for either party.

Stipulated and agreed this 14th day of March, 1952.

Lloyd A. Fry Roofing Company, Petitioner, By
Glenn M. Elliott, Attorney.

Arkansas Public Service Commission et al, Re
spondents, By Eugene R. Warren, Attorney.

[fol. 332] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. —

LLOYD A. FRY ROOFING CO., Petitioner,

vs.

SCOTT WOOD, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—Filed March 31, 1952

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 21st, 1952.

Tom C. Clark, Associate Justice of the Supreme
Court of the United States.

Dated this 31st day of March, 1952.

[File endorsement omitted.]

[fol. 333] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. 721

LLOYD A. FRY ROOFING COMPANY, Petitioner,

vs.

SCOTT WOOD, et al., as Arkansas Public Service Commission

ORDER ALLOWING CERTIORARI—Filed June 2, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951

1952

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al. as ARKANSAS PUBLIC
SERVICE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Arkansas.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Counsel for Petitioner.

Of Counsel for Petitioner:

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1624 I Street,
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No.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al. as ARKANSAS PUBLIC
SERVICE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Arkansas.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above entitled case on January 7, 1952.

OPINIONS BELOW.

The opinion of the Chancery Court of Pulaski County, Arkansas (R. 219), is unreported. The majority and dissenting opinions of the Supreme Court of Arkansas (R. 225, 232) are unreported. The per curiam order of the Supreme Court of Arkansas (R. 237) is unreported.

JURISDICTION.

The final judgment of the Supreme Court of Arkansas was entered on January 7, 1952 (R. 237). By order entered in this Court on March 31st, 1952, the time for filing this petition was extended to and including April 21st, 1952.

The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1257 (3). Although the federal questions here sought to be reviewed were not discussed by the majority of the Supreme Court of Arkansas in its opinion (R. 225), reference to a portion thereof was made in the dissenting opinion (R. 232), and all of such questions were specifically and properly by brief, oral argument and petition to rehear (R. 234), considered by and determined adversely to the interests of petitioner by the Supreme Court of Arkansas, as is reflected by "Certificate as to Existence of a Federal Question" ordered to be entered by the court en banc. Said certificate appears at page 238 of the record and is attached hereto as Appendix A, page 19, infra.

QUESTION PRESENTED.

Whether state regulatory bodies may, by indirection in administering state statutes designed to permit regulation by such bodies of intrastate common and contract motor carrier transportation, regulate, unduly burden and destroy interstate commerce performed by private carriers of property by motor vehicle, Congress having pre-empted the field of interstate motor carrier transportation, whereby such private carriers are deprived of their property without due process of law.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix B, *infra*, pages 21-23.

STATEMENT.

Petitioner, Lloyd A. Fry Roofing Company, is the largest composition asphalt roofing manufacturer in the United States, at the time of the trial below having 19 plants located throughout the United States. One of such plants is located at Memphis, Tennessee, from which point roofing is sold and delivered to points in a number of states, including the State of Arkansas (R. 45, 46). It has a wholly-owned subsidiary, Volney Felt Mills, Inc., which manufactures felt for use by petitioner; the operations of Volney are on petitioner's premises and are conducted under the direction of petitioner's supervisory personnel. The officers and directors of the two corporations are the same (R. 45, 46, 95).

In November, 1949 (R. 116), in connection with a new pricing and merchandising program and in order to enjoy the numerous advantages detailed at pages 83-86 of the record, petitioner determined to deliver its products by utilization of a fleet of tractor-trailer units to be operated by its employees and in the exclusive possession and under the sole direction and control of petitioner (R. 62-63, 69, 77-78, 82-83). These units were leased from Frank E. Whittington, Inc., a motor vehicle leasing and maintenance service (R. 23), under long term written leases, compensation for use thereof being paid upon the basis of running miles (R. 7-14, 25, 70-71, 87, 95). At all times and in every respect equipment leased by petitioner was under its sole and absolute direction and control (R. 87-88).

At the time of the trial petitioner, at Memphis, was leasing eighteen trailers and twelve tractors from Whittington.

Whittington owned all the trailers, specially constructed for petitioner's use, and seven of the tractors (R. 24, 71, 74-75, 85). Five of the tractors leased by Whittington to petitioner were owned by persons employed by petitioner as drivers, these persons having leased the tractors to Whittington under written long term leases, the latter having then leased same to petitioner under the terms of its lease agreement with petitioner (R. 24, 34-36, 7-14, 70-71).

Petitioner has no connection with, control over or knowledge of arrangements between Whittington and driver-owners (R. 76, 100). Neither does Whittington have any connection with employment of drivers by petitioner, nor exercise any supervision over the drivers (R. 32, 38, 63, 105). There was no agreement that drivers employed by petitioner would be assigned to the operation of equipment which they might own (R. 38, 76, 87), but, as a matter of sound business practice, when petitioner learned that an employee owned equipment in its fleet, it endeavored to assign him to the operation thereof (R. 103-104). At no time has it been any concern of petitioner as to who owned the equipment (R. 76). Drivers do not always operate equipment owned by them (R. 86).

Whittington has absolutely no connection with operation of equipment by petitioner (R. 38-42).

A true employer-employee relationship existed between petitioner and its drivers irrespective of whether they did or did not own equipment, and there was no distinction whatsoever, in the relationship between petitioner and drivers who did or did not own equipment either in the method of employment, compensation or direction and control. Petitioner's records with respect to all individual drivers involved in this proceeding are exhibits to the official transcript and it is stipulated that these records are representative of the records on employment of all drivers by petitioner (R. 69-70); by further stipulation only one

set of such records has been printed (R. 241), the stipulation setting forth the reason, in each instance, for the omission of an exhibit in printing.

With respect to all drivers, uniform employment applications are required (R. 47, 185); the employer conducts investigation as to character and ability and requires a medical examination by a physician of its choice (R. 48); fidelity bonds are required, with the premium being paid by petitioner (R. 49, 186); truck drivers are compensated on the basis of so much per running mile, with incidentals, and carried on petitioner's payroll as employees (R. 50, 57, 188); petitioner deducts social security and withholding taxes on all drivers as employees, pays workmen's compensation premiums thereon; the drivers get the benefit of petitioner's uniform vacation plan; and the drivers participate, at their election, in group insurance available only to employees of petitioner (R. 58, 60, 67, 101); the drivers are paid regular employee checks (R. 60, 189); petitioner alone employs and discharges drivers, gives no consideration to whether an applicant does or does not own equipment, determines the compensation to be paid drivers; there is no difference in compensation between drivers, nor is there any variation in mileage rate depending on load (R. 61-62).

Petitioner alone determines when, where, how and what will be transported in leased equipment and by the drivers thereof; does not permit the use of such equipment for any purposes other than its own, nor its drivers to be employed by any other person (R. 62-63, 69). The drivers have no discretion as to the equipment they will operate (R. 77).

Petitioner assumes full responsibility for operation of the vehicles as well as safety of cargo, and complies with all of the hours of service and safety regulations of the Interstate Commerce Commission applicable to private carriers (R. 63-66, 77-78, 190).

Neither bills of lading nor waybills are used, a simple delivery ticket being employed (R. 66, 191); reports of defects in equipment are made to petitioner by drivers (R. 68, 192).

Insofar as the State of Arkansas and the issues at bar are concerned, all transportation performed by petitioner and its drivers is interstate transportation (R. 45-46), being from Memphis to points in Arkansas of petitioner's own merchandise or of raw materials for Volney Felt Mills, Inc., from points in Arkansas to Memphis, Tennessee; no charge being made for this service for the wholly owned subsidiary (R. 95-96, 116).

The primary business of petitioner is the manufacture and distribution of asphalt roofing, and during the period in suit utilization of the transportation method under attack resulted in a substantial deficit (R. 78-79).

Under the guise of enforcing the Arkansas Motor Carrier Act, the representatives of respondents arrested a number of petitioner's drivers making interstate deliveries, impounded and delayed its merchandise and equipment, prevented fulfillment of its contract with its customers, and averred their intention to continue so to do. No question of taxation or exercise of police power is presented, the sole issue being whether common or contract carriage was being performed without a permit or certificate from the Arkansas Public Service Commission (R. 112, 122-136, 138). Only those drivers who owned the tractors then being operated by them as petitioner's employees were arrested, and no issue has been made by respondents as to the legality of identical transportation being performed by petitioner's drivers who did not own tractors.

An injunctive action was instituted (R. 1-13) and tried in the Chancery Court for Pulaski County, Arkansas, following which the Chancellor made comprehensive findings

and conclusions (R. 219-223), holding that petitioner's equipment leases were bona fide, had been strictly adhered to, that a true employer-employee relationship existed between petitioner and all of its truck drivers, and that petitioner was a private carrier. Respondents were enjoined from interfering with petitioner or its employees in performance of the described transportation upon the theory that common or contract carriage was being performed.¹

The Supreme Court of Arkansas, on appeal by respondents, with two justices dissenting (R. 232), reversed the decree of the Chancery Court (R. 225) and held that petitioner's drivers who owned tractors which had been leased to petitioners were contract carriers and perforce must obtain Arkansas intrastate contract carrier permits before they could transport petitioner's goods in interstate commerce, and that they were subject to prosecution for violation of the penal provisions of the Arkansas Motor Carrier Act for having failed so to do. Petition for rehearing was duly filed (R. 234), and denied (R. 237).

Prior to approximately March 1, 1950, Whittington employed one form of lease in procuring equipment from owners thereof (R. 25-31) and subsequent to such date another form was utilized (R. 25, 33-36). While petitioner had no connection with or knowledge of arrangements between Whittington and owners of equipment (R. 76, 100), it should be noted that the opinion of the court below is predicated upon analysis of a form of equipment lease not being used when the litigation was instituted or tried and that, as well, the features of the initial form employed by Whittington which were found particularly objectionable by the court below were never enforced by Whittington in his relations with the owners of equipment (R. 38, 76, 87).

¹ A temporary restraining order was first obtained, which was dissolved by agreement that matters would remain in status quo until disposition of application for final injunction (R. 14, 19), which stipulation was revived after entry of final order by the Supreme Court of Arkansas (R. 238).

We are confident that in brief, should this petition be granted, we shall be able to establish to the satisfaction of this court, upon the record as made, that irrespective of which form of lease was used by Whittington in procuring equipment that petitioner's status, at all times, has been that of a private carrier and that a bona fide employer-employee relationship existed between it and all drivers employed by it.

We believe the opinion of the majority of the court below to be without basis in law or foundation in fact. As it demonstrated to the court below by its petition for rehearing, and as is demonstrated by the enumeration of questions presented herein (p. 2, supra), the opinion of the majority of the court below could have resulted only, firstly, from pretermission of application or erroneous application of controlling principles of law to undisputed facts and, in the next place, findings of fact which, as the dissenting opinion recognizes (R. 232), have absolutely no basis in the record. The district court decisions relied upon in the decision below are obviously distinguishable in fact, and, in principle, support the principles upon which petitioner relies. We shall not here labor the point but it appears obvious that the majority opinion stems from the conclusion that petitioner, engaged solely in interstate commerce, by operating under arrangements held, without factual basis, not to be bona fide is seeking to enjoy the benefits of some privilege or to avoid some supervision which respondents, an intrastate body, might grant or exercise. The answer to the first proposition is obvious; as to the second, without briefing, the merits, we can only say that there is not one iota of evidence in the record to support this factual conclusion.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Arkansas erred:

1. In not holding that petitioner is being discriminated against and deprived of its property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. In not holding that interstate commerce is being unduly burdened and destroyed contrary to the provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States.

3. In not recognizing that the only transportation involved is interstate transportation, and that Congress has pre-empted the field of regulation of such motor carrier transportation.

4. In not considering whether petitioner is a private carrier whose primary business is the manufacture of its products, and in not holding that the transportation of petitioner's products could not, at one and the same time, be both private and contract carriage.

5. In not considering whether a bona fide employer-employee relationship existed between petitioner and its truck drivers, and in not holding that, in the transportation of petitioner's products the truck drivers could not, at one and the same time, be both bona fide employees and contract motor carriers.

6. In not considering ownership of motor vehicle equipment determinative of whether private or contract carriage was being performed therewith, and in failing to consider the extent to which petitioner exercised control over the equipment and driver thereof as being material in determining the type carriage being performed.

7. In not holding that petitioner's equipment leases were bona fide, scrupulously observed in actual operations, and in holding that petitioner's method of operation was adopted to avoid compliance with the Arkansas Statute.

8. In failing to recognize economic reality and to consider the absurdity of respondents' position in that the prosecutions involved are for failure to have intrastate permits which, although held, would not cover the transportation being performed..

9. In failing to give any weight to decisions of the Interstate Commerce Commission relating to interstate commerce.

10. In predicating its decision on a factual basis having no support in the record.

11. In failing to affirm the decree of the chancery court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below, as evinced by the majority opinion, clearly approves the effort of a state administrative body to regulate interstate commerce, a field pre-empted by Congress. This under a state statute designed to permit regulation of intrastate commerce. The implications are plain. Each of the forty-eight states, as we will point out more fully should this petition be granted, has a statute comparable to that of the State of Arkansas here involved. Unless the action sanctioned by the court below is declared illegal regulation of interstate commerce by each of the states will be permitted under local statutes.

It is established that the only transportation involved in this proceeding is interstate transportation. The Arkansas Motor Carrier Act, Appendix B hereto, invests the Arkansas Public Service Commission solely and alone with jurisdiction over common and contract carriers engaged

in intrastate commerce; the statute contains no definition of private motor carrier, and permits regulation of interstate commerce only to the extent permitted by the United States Constitution and the Acts of Congress.

The Congress, by enactment of Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 et seq., and by the enunciation of its National Transportation Policy, 54 Stat. L. 899 (U. S. Code, Title 49, notes preceding Secs. 1, 301, 901 and 1001), has completely pre-empted the field of interstate motor carrier transportation.

It is clear, therefore, that the decision of the court below in permitting state regulation of interstate commerce is contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States, and such decision in practical application and inevitable construction when applied to the undisputed facts in this case is directly contra to the numerous decisions of this court establishing the fundamental law of the land to be that no part of the power of regulating commerce that is vested in Congress can be executed by a state, and that when Congress has exercised its paramount and all-embracing authority in the regulation of interstate commerce the power of the state with respect thereto ceases to exist. **Gibbons v. Ogden**, 22 U. S. 1, 6 L. Ed. 23; **Edwards v. People of State of California**, 314 U. S. 163, 62 S. Ct. 164, 86 L. Ed. 119; **Milk Control Board v. Isenburg Farm Products**, 306 U. S. 346, 83 L. Ed. 752; **Hinson v. Lott**, 75 U. S. 148, 19 L. Ed. 387; **U. S. v. Hill**, 248 U. S. 420, 63 L. Ed. 337; **Pennsylvania R. Company v. Public Service Commission of Pennsylvania**, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142; **Chicago, Rock Island and Pacific R. Company v. Hardwich Farmers Elevator Company**, 226 U. S. 426; **State of Wisconsin v. City of Duluth**, 96 U. S. 379, 24 L. Ed. 668; **Missouri Pacific R. Company v. Stroud**, 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683; **City of Newark v. Central R. Company of New Jersey**, 267 U. S. 377, 45 S. Ct. 328, 69 L. Ed. 663.

As will be demonstrated more fully in brief should this petition be granted, the performance of private motor carrier transportation by the use of leased equipment driven by the owners thereof constitutes a very considerable portion of the interstate motor carrier transportation performed throughout the country, and settlement of the question as to the extent to which such transportation may, by indirection, be regulated, controlled or prohibited by the states is plainly in the public interest. That question is directly presented in this case.

2. The decision of the court below is believed to sanction action of a state regulatory body in enforcement of a state statute which unduly burdens, hinders and destroys interstate commerce, contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States. It is not disputed of record that in each instance when petitioner's drivers were arrested they were engaged in the performance of interstate transportation, delivering petitioner's goods to its customers in fulfillment of its contracts, and that respondents propose to continue such arrests and prevent petitioner from delivering its goods and performance of its contracts unless enjoined from so doing.

The decisions of this court well establish that a state may not enforce any law, or in a manner, the necessary effect of which is to prevent, obstruct or burden interstate commerce, a burden upon interstate commerce being any action of a state which directly impairs the usefulness of facilities for such commerce. It cannot be denied that by the arrests of petitioner's drivers and delay and impoundment of its equipment the interstate commerce in which it was engaged was being burdened and hindered by the attempted enforcement of the Arkansas Motor Carrier Act by the respondents herein. The decision of the court below, in approving such action, is perforce contra to the decisions of this court enunciating the foregoing governing principles. **LaCoste v. Department of Conservation of**

the State of Louisiana, 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437; **Schwab v. Richardson**, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183; **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; **McDermott v. Wisconsin**, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754; **Savage v. Jones**, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182.

3. It is believed that the decision of the court below sanctions actions of the respondents which abridge the privileges of petitioner and deprive it of its property without due process of law. No question of the legitimacy of petitioner's business being involved, nor of its compliance with all police, tax and safety laws and regulations, it is petitioner's position that it should be permitted to sell and deliver its goods in interstate commerce in motor vehicle equipment leased to and operated by it with employees of its own choosing without hindrance from the State of Arkansas until, by some state or federal court or agency having jurisdiction, its operations shall have been held to be illegal. This has not been done. If petitioner is a private carrier of goods solely in interstate commerce, then its employees also so solely engaged perforce cannot be intrastate contract carriers.

Interference with petitioner's operations, sanctioned by the decision of the court below, is believed to contravene Section 1 of the Fourteenth Amendment to the Constitution of the United States; and it is plainly in the public interest for this court to determine the extent to which state regulatory bodies may, by indirection in the enforcement of state statutes abridge the privileges of citizens and prevent them from fulfilling contracts and engaging in legitimate enterprises.

4. The decision of the court below is believed to be erroneous and results from refusal of the court to consider three principal issues: (1) The primary business of petitioner; (2) whether the transportation being performed at

the times petitioner's drivers were arrested was being performed by petitioner as a private carrier; (3) whether a bona fide employer-employee relationship existed between petitioner and its drivers who were arrested.

Petitioner's drivers are held by the court below to be contract carriers within the meaning of the Arkansas Motor Carrier Act (Appendix B). There is no question in the record but that at such times these drivers were transporting petitioner's goods in equipment being operated under petitioner's exclusive direction and control. This court has approved the rule that the primary business of an establishment delivering goods by the use of motor vehicle equipment determines whether it is a private, contract or common carrier. Such, as well, has been the consistent ruling of the Interstate Commerce Commission with respect to interstate motor carrier transportation. The decision of the court below is based upon a refusal to consider applicability of the primary business test and is, therefore, believed to be contra to the decision in **Brooks Transportation Company et al. v. United States of America et al.**, 93 F. Supp. 517, affirmed per curiam 340 U. S. 925, as well as of the decisions of the Interstate Commerce Commission therein involved, **Lenoir Chair Company—Contract Carrier Application**, 48 M. C. C. 259, and **Schenley Distillers Corporation—Contract Carrier Application**, 48 M. C. C. 405. If petitioner's primary business is the manufacture and distribution of roofing products it is a private carrier.

Clearly the question whether transportation can at one and the same time be private and contract carriage, as well as the question whether a truck driver can at one and the same time be a bona fide employee of a private carrier and, in the performance of the same transportation, a contract carrier, are questions of importance in the administration of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 301 et seq.) the terms involved

being defined at Section 303 (a) (15) (17); Appendix B hereto.

On the record in this case the foregoing impossible situations would be a necessary result of the decision below.

Settlement of the foregoing questions by this court is plainly in the public interest since they are likely to be presented in enforcement proceedings by various states, and such would be a guide as well as to the proper construction of the federal statute.

5. This court has plainly said that in matters of interstate transportation the opinions of the Interstate Commerce Commission are entitled to great weight. **United States et al. v. American Trucking Association**, 310 U. S. 534, 60 S. Ct. 1059; **Levinson v. Spector Motor Service**, 330 U. S. 649. Such admonition was utterly ignored by the majority opinion below, but was recognized in the minority opinion (R. 225, 232).

In **Watson Manufacturing Company, Inc.—Common Carrier Application**, 51 Motor Carrier Cases 223, the Interstate Commerce Commission specifically held that the owner of motor vehicle equipment could lease same to a private carrier and then be employed by the carrier as the driver thereof without becoming a contract carrier within the meaning of the Interstate Commerce Act [U. S. Code, Title 49, Section 303 (a) (15)]. Such Act is the only legislation applicable to the case at bar inasmuch as interstate transportation alone is involved. The foregoing decision of the Interstate Commerce Commission should be controlling.

Furthermore, the Interstate Commerce Commission has long since enumerated those aspects of motor carrier transportation which must be present before it can be said that contract carriage is being performed. The court below entirely ignored these decisions, as well as the fact that

not one element of contract carriage is reflected by the record in the case at bar. See **Contracts of Contract Carriers**, 1 Motor Carrier Cases 628; **Filing of Contracts by Contract Carriers**, 2 Motor Carrier Cases 55; **Western Transport Company—Contract Carrier Application**, 2 Motor Carrier Cases 107.

It is plainly in the public interest for this court to settle the question as to whether, with respect to interstate motor carrier transportation, the opinions of the Interstate Commerce Commission or those of state courts are to be controlling. Every private carrier of property operating with leased equipment driven by the owner thereof is affected by a correct decision of this question.

6. It is believed that the decision of the court below contravenes the National Transportation Policy as enunciated by Congress (54 Stat. L. 899; notes preceding U. S. Code, Title 49, Sections 27, 301, 301, and 1001, Appendix B), requiring fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, and to be contra to the decisions of this court in implementation thereof.

The decision of the court below ignores entirely the undisputed fact that at all times the leased motor vehicle equipment was under the **exclusive** direction and control of petitioner, and such decision is obviously predicated on the sole question of ownership thereof. Thus, although no question is made but that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers (which fact the court below also ignored) the practical effect of the decision below is that petitioner's employees driving their own equipment leased to petitioner are contract carriers, whereas its other truck drivers, employed, directed and supervised on exactly the same basis, are not affected by the Arkansas Motor Carrier Act.

We know of no decision of this court on the question whether exercise of direction and control or ownership

of motor vehicle equipment is determinative of whether contract carriage is being performed, but the Interstate Commerce Commission, as well as this court, in determining whether common or other carriage was being performed and by whom have held that the person who assumed full responsibility for the direction, operation, and control of the equipment, and acknowledged its responsibility to the public therefor, was the carrier, irrespective of ownership of the equipment. **Floyd H. Johnson—Extension**, 17 Motor Carrier Cases 733, 740; **Performance of Motor Common Carrier Service by Riss & Company, Inc.**, 46 Motor Carrier Cases 327, 359; **Thomson v. United States**, 321 U. S. 19, in all of which decisions the "control and responsibility test" was recognized as being determinative of the carrier status of affected persons.

The decision of the court below applies solely to the "ownership test" and ignores the "control and responsibility test." It is, therefore, greatly in the public interest that this court determine whether the same or different standards are to be applied as between common, contract or private motor carrier transportation in interstate commerce is being performed. Every private carrier in the United States delivering its merchandise in interstate commerce by the use of equipment leased from the drivers thereof will be directly affected by this decision.

7. The decision of the court below is believed to ignore practical reality. It sanctions the arrest and conviction of petitioner's drivers for not having contract carrier permits issued by the Arkansas Public Service Commission. It apparently is predicated upon the assumption that petitioner by its method of operation seeks to enjoy some privilege which the Arkansas Public Service Commission might grant or to avoid some supervision which the Commission might exercise. It entirely ignores the fact that only interstate transportation is being performed and that, insofar as the issues in this case or the criminal proceed-

ings are concerned, the only authority of the Arkansas Public Service Commission is with respect to intrastate transportation, and there is no legislative sanction requiring a motor carrier to obtain intrastate operating authority for the performance of interstate transportation.

It is plainly in the public interest for this court to settle the question whether the states may require motor carriers engaged solely in interstate transportation to obtain intrastate operating rights from the various state regulatory bodies. Every interstate motor carrier in each of the forty-eight states will be affected by settlement of this question.

SUMMARY.

For the foregoing reasons it is respectfully presented that substantial questions of statutory and constitutional considerations are involved, as well as a determination of the extent to which a state may exercise control over interstate motor carrier transportation, and that settlement by this court of the various questions presented would be plainly in the public interest in that the rights and responsibilities of all interstate motor carriers would be determined. For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Certificate as to the Existence of a Federal Question.

“On motion of Lloyd A. Fry Roofing Company, appellee, this court, in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the opinion and per curiam opinion heretofore rendered and made herein, that said appellee properly raised and presented to this court by brief, oral argument and petition to rehear the federal questions that the proposed enforcement and method of enforcement of the Arkansas Motor Carrier Act, Act 367 of the Acts of 1941, Arkansas, deprived appellee of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that thereby interstate commerce was unduly burdened and destroyed and the Arkansas Public Service Commission was attempting to regulate interstate commerce in a field completely preempted by Congress, contrary to Article 1, Section 8, Clause 3, of the Constitution of the United States and Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 et seq. And it became material to the determination of this case in this court to determine said question so made by appellee, which questions were considered and determined by this court adversely to said appellee, as appears from the entry of per curiam order overruling appellee’s petition to rehear.

“It is hereby certified that this court is the highest court of law and equity in the State of Arkansas in which a decision of this case could be had.

“Enter this the 11th day of February, 1952.

Supreme Court of Arkansas.

“I, Griffin Smith, Chief Justice of the Supreme Court of Arkansas, do hereby approve entry of the foregoing cer-

tification as being the action taken and made by the Supreme Court of Arkansas en banc on the day and date aforesaid.

/s/ Griffin Smith,
Chief Justice, Supreme Court of
Arkansas."

APPENDIX "B."

Pertinent portions of statutes involved:

Act 367 of the Acts of Arkansas, 1941, Arkansas Motor Carrier Act:

"Section 3. The provisions of this Act except as hereinafter specifically limited, shall apply to the transportation of passengers or property by motor carriers over public highways of this state, and, to the procurement of, and provision of, facilities for such transportation; and the regulations of such transportation, and the procurement thereof and the provision of facilities therefor, is hereby vested in the Arkansas Corporation Commission.¹

"Section 4. Nothing herein shall be construed to interfere with the exercise by agencies of the Government of the United States or its power of regulation of interstate commerce.

"Section 5. (a) As used in this Act—

"(7) the term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or indirectly, or by a lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public by motor vehicle for compensation whether over regular or irregular routes.

"8. The term 'contract carrier by motor vehicle' means any person, not a common carrier included under paragraph 7, Section 5 (a) of this Act who or which, under individual contracts or agreements and whether directly or indirectly or by a lease of equip-

¹ Under Act 40 of the Acts of Arkansas, 1945, the powers previously vested in the Arkansas Corporation Commission were transferred to the Arkansas Public Service Commission.

ment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation.

"Section 5. (b) Nothing in this Act shall be construed to include . . . (3) any private carrier of property.

"Section 6. (a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this Act . . . (2) to regulate contract carriers by motor vehicle as prescribed by this Act . . .

"Section 11. (a) No person shall engage in the business of a contract carrier by motor vehicles over any public highway in this state unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business . . ."

"Section 22. (a) Any person knowingly and willfully violating any provision of this Act . . . shall, upon conviction thereof be fined not more than \$100.00 for the first offense and not more than \$500.00 for any subsequent offense. . . ."

"Section 25. The terms and provisions of this Act shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the Acts of Congress."

Part II, Interstate Commerce Act, Title 43, U. S. Code, Sections 301 et seq.:

"Section 303. (a) As used in this part—(15) the term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein [common carrier transportation] by

motor vehicle of passengers or property, in interstate or foreign commerce for compensation."

"Section 303. (a) As used in this part—(17) the term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

"Section 304. (a) It shall be the duty of the Commission—(2) to regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operations, and to that end prescribed qualifications and maximum hours of service of employees, and standards of equipment . . ."

National Transportation Policy Enunciated by Congress
(54 Stat. L. 899; U. S. Code, Title 49, Notes Preceding Section 1, 301, 901 and 1001):

"It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each. . . ."

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al. as ARKANSAS
PUBLIC SERVICE COMMISSION,
Respondents.

No. 721

37

REPLY

Of Petitioner to Brief in Opposition to Petition for
a Writ of Certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al. as ARKANSAS
PUBLIC SERVICE COMMISSION,
Respondents.

No. 721.

REPLY

**Of Petitioner to Brief in Opposition to Petition for
a Writ of Certiorari.**

Comes your petitioner, Lloyd A. Fry Roofing Company, and for reply to the brief in opposition to its petition for writ of certiorari herein filed respectfully shows to the Court:

It is significant that respondents, as did the court below, carefully avoid mention of the fundamental issues in the case at bar. Consideration of these issues is essential not only that this litigation and the rights of petitioner may be properly decided, but also is necessary in that the interstate private motor carrier industry at large may be advised as to the correct interpretation of the Interstate Commerce Act and the extent to which it is subject to regulation by state regulatory bodies under state statutes designed to permit regulation of intrastate commerce.

At the sake of repetition we repeat that the only transportation here involved is interstate transportation, and that the Arkansas Motor Carrier Act, which respondents

seek to enforce, by Section 5 (b) (3) thereof (page 22 of Petition for a Writ of Certiorari) specifically precludes its application to "any private carrier of property," and that the Arkansas Motor Carrier Act contains no definition of "private carrier of property." The Interstate Commerce Act (page 23 of the Petition for a Writ of Certiorari) does contain a definition of "private carrier of property by motor vehicle."

Respondents, in their brief in opposition to the petition for a writ of certiorari, erroneously assume that the basis therefor is an effort to have this Court review findings of fact of the lower court. Such is not the case. The lower court made no findings of fact on essential undisputed facts of record which, if considered at all, would have precluded the result below.

In the first place, the court below made no finding with respect to whether petitioner was or was not a private carrier exercising exclusive direction and control over motor vehicle equipment leased by it and of the drivers thereof; in the next place the court below made no finding as to whether a bona fide employer-employee relationship existed between petitioner and its truck drivers, irrespective of whether they owned the equipment being operated by them; and in the third place the court below made no finding with respect to whether or not the terms and conditions of the equipment lease agreements were or were not scrupulously complied with in actual operations. As petitioner has heretofore pointed out in its petition for a writ of certiorari consideration of the foregoing matters is essential to a determination of whether interstate transportation is private, contract or common carriage within the meaning of the Interstate Commerce Act. A review of the record in this case will conclusively establish that there is no conflict in the evidence with respect to any material fact determinative of the questions above, that the written equipment lease agreements were scrupu-

lously complied with in actual operation, that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers, and that petitioner was in truth and in fact a private carrier transporting its goods in interstate commerce.

We reiterate that if petitioner, engaged solely in interstate commerce, is a private carrier within the meaning of the Interstate Commerce Act, and, as a matter of law, if a bona fide employer-employee relationship exists between it and its truck drivers, then it would be impossible for its truck drivers at one and the same time and in the performance of the same transportation to be contract carriers within the meaning of the Arkansas Motor Carrier Act.

Attention is directed, as well, to the fact that the brief in opposition to the petition, as did the court below, wholly ignores the uncontradicted evidence of record that petitioner had and at all times exercised complete direction and control over the use and operation of leased equipment and assumed full responsibility therefor, irrespective of ownership thereof.

And, while the court below comes up with the conclusion that as a matter of law petitioner's drivers are contract carriers within the meaning of the Arkansas Motor Carrier Act, it is particularly significant that there is no factual finding by the court on any element held by the Interstate Commerce Commission to be essential for motor carrier transportation to be interstate contract carriage. For example, the Interstate Commerce Commission has held that interstate contract carriage entails the execution of a mutual contract between carrier and shipper for a definite period of time, for the transportation of specific commodities in a definitely described territory or between specified points, at specified, filed and published minimum rates and charges; such contracts and tariffs containing minimum rates and charges must be approved

by the Interstate Commerce Commission, and in such contracts the rights, duties and obligations of both carrier and shipper must be well defined, the shipper be obligated to furnish some definite or easily ascertainable minimum amount of freight during the term of the contract, or for a given period, and the carrier bound to transport the freight agreed to be shipped for the consideration specified in the contract. See **Contracts of Contract Carriers**, 1 M. C. C. 628; **Filing of Contracts by Contract Carriers**, 2 M. C. C. 55; **Western Transport Company, Contract Carrier Application**, 2 M. C. C. 107. The opinion of the court below does not allude to the existence or nonexistence of any of the foregoing elements, and it is undisputed of record that the only agreement between petitioner and its truck drivers was an oral agreement of indeterminate duration under which the drivers were simply employed to drive trucks at the will of petitioner for a specified union rate per mile (R., pp. 57, 62-63).

It is respectfully presented that the reference in respondent's brief in opposition to petition for a writ of certiorari to a letter of a field representative of the Interstate Commerce Commission (R. 162) is misleading; in the first place, such representative was not expressing an opinion with respect to existing contracts (R. 167); in the next place the Interstate Commerce Commission indicated its disagreement with its field representative's views by failing to take the action recommended by him (R. pp. 171-72).

Petitioner has no quarrel with the principle that, within permissible limits, states may impose regulations on interstate commerce where such do not unduly burden, hinder or destroy such commerce, but the cases cited in respondents' brief are not in point in this proceeding.¹ It must be

¹ Petitioner, in its petition for a writ of certiorari (pages 17-18 of the petition), has taken the position that, under the undisputed facts of record, the only permit which the Arkansas Public Service Commission could grant would be for the performance of intrastate transportation, whereas the only transportation involved in this proceeding is interstate.

remembered that the transportation here involved is private carriage within the meaning of the Interstate Commerce Act, and that the Arkansas Motor Carrier Act specifically provides that it shall not apply to private carriage. To refer to the cited cases in **Columbia Terminals Company v. Lambert et al.**, 309 U. S. 620, 84 L. Ed. 983, plaintiff admittedly was a contract carrier; **South Carolina State Highway Department v. Barnwell Brothers, Inc., et al.**, 303 U. S. 177, 82 L. Ed. 734, establishes simply the right of states to enact height and weight limitations for vehicles engaged in using the highways of the state where no such limitations had been prescribed by Congress; and in **Frank Eicholz v. Public Service Commission of the State of Missouri**, 306 U. S. 268, 83 L. Ed. 641, the court simply held that the state had a right to revoke an interstate common carrier certificate granted by it to the carrier by virtue of the fact that the carrier had violated an intrastate permit, the carrier having applied for but not yet obtained an interstate common carrier certificate of convenience and necessity. Thus it is plain that neither of these decisions have any application to the principles involved in the case at bar.

Such position is predicated upon the Rules and Regulations of the Arkansas Public Service Commission promulgated pursuant to the authority vested in it by Act 367 of the Acts of Arkansas of 1941. Pertinent portions of such rules and regulations are attached hereto as Appendix "A." It is to be noted that as a prerequisite to the granting of an interstate permit the carrier must file a copy of the operating authority granted by the Interstate Commerce Commission. Petitioner's truck drivers have no contract carrier authority from the Interstate Commerce Commission inasmuch, under rulings of such Commission, petitioner is a private carrier and its drivers are its bona fide employees. Further, other prerequisites of the Arkansas Public Service Commission for the obtaining of an Interstate Contract Carrier's Permit cannot be met by petitioner's drivers, inasmuch as there is no contract between petitioner and its drivers for the transportation of any specific commodity over any given route or routes, nor between any specified points. Petitioner's drivers simply transport petitioner's products, in quantities designated by petitioner, over any route designated by petitioner, and, to any point designated by petitioner. Neither can petitioner's drivers satisfy the prerequisite of the Arkansas Public Service Commission that a description of the equipment to be used be furnished inasmuch as petitioner alone designates the equipment to be used, and the financial status of its drivers is immaterial to petitioner inasmuch as it assumes complete responsibility for the safety of the cargo and operation of the leased motor vehicle equipment.

The Congress has invested the Interstate Commerce Commission with jurisdiction to regulate private motor carrier transportation in interstate commerce and has defined such transportation, Title 49, U. S. Code, Sections 303 (a) (17) and 304 (a) (3), and petitioner is established of record to have complied with all rules and regulations of the Interstate Commerce Commission with respect to private carriage (R. 63-66, 110). The Congress has preempted, as well, the field of interstate contract carriage, Title 49, U. S. Code, Sections 303 (a) (15) and 304 (a) (2), and the Interstate Commerce Commission has, as petitioner pointed out, supra, defined the elements essential to the existence of contract carriage.

There is, therefore, among others set forth in the petition for a writ of certiorari, the substantial question as to the extent to which states, in interpretation of local statutes, may be permitted to set up standards with respect to interstate commerce for determining whether private or contract carriage is being performed contrary to and at variance with the Interstate Commerce Act and its interpretation by the Interstate Commerce Commission and the Courts.

For the reasons above, as well as for the additional reasons assigned in the petition for a writ of certiorari, it is respectfully presented that the petition should be granted and that this Court should determine the substantial federal questions involved.

Respectfully submitted,

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APPENDIX "A."

Pertinent excerpts from "Rules and Regulations Governing Motor Carriers" promulgated by the Arkansas Corporation Commission, whose functions and duties and enforcement of such rules and regulations were assumed by the Arkansas Public Service Commission pursuant to Act 40 of the Acts of Arkansas of 1945, are as follows:

Instructions for Filing Applications.

"1. Formal application must be filed with the Arkansas Corporation Commission upon forms furnished by the Commission. Said application must contain the petitioner's name, place of business and post office address; a detail description of the route over which the applicant desires to operate, a description of the equipment to be used, a full and complete financial statement, giving assets and liabilities, accompanied by a map showing the routes of the proposed operation.

"(a) If the proposed operation is freight service, the application must state the commodities to be transported, whether special or general, and whether the carrier is common or contract.

"(b) If applicant is a contract carrier an executed copy of the contract must accompany the application. All contracts must be approved by the Commission."

Interstate.

"5. For an Interstate permit you must also file application, accompanied by a \$25.00 filing fee. Also send a copy of your authority granted by the Interstate Commerce Commission. It will not be necessary for you to appear in person as the Commission does not require a formal hearing on interstate application, but you must file your public liability, property damage, and cargo insurance with the Arkansas Endorsement attached, countersigned by an Arkansas Agent."

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members of and
Composing the Arkansas Public Service Commission,
Respondents.

BRIEF

**Filed on Behalf of Petitioner, Lloyd A. Fry Roofing
Company.**

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members of and
Composing the Arkansas Public Service Commission,
Respondents.

BRIEF

**Filed on Behalf of Petitioner, Lloyd A. Fry Roofing
Company.**

MAY IT PLEASE THE COURT:

Comes the petitioner, Lloyd A. Fry Roofing Company,
and respectfully submits this its brief in the above-styled
cause.

OPINIONS BELOW.

The opinion of the Chancery Court of Pulaski County,
Arkansas (R. 219), is unreported. The majority and dis-
senting opinions of the Supreme Court of Arkansas (R. 225,
232) are unreported. The per curiam order of the Supreme
Court of Arkansas (R. 237) is unreported.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1257 (3).

Petition for certiorari was duly filed on April 21, 1952, and granted by order of this court on June 2, 1952.

Although the Federal questions here involved were not discussed by the opinion of the majority of the Supreme Court of Arkansas (R. 225), allusion was made thereto in the dissenting opinion (R. 232), and all of such questions were specifically and properly presented by brief, oral argument and petition to rehear (R. 234), considered by and determined adversely to the interests of petitioner by the Supreme Court of Arkansas, all as is reflected by "Certificate as to Existence of a Federal Question" (R. 238).

QUESTION PRESENTED.

Congress having pre-empted the field of interstate motor carrier transportation, the question presented is the extent to which state regulatory bodies may, by indirection in administering state statutes designed to permit regulation by such bodies of intrastate common and contract motor carrier transportation, regulate, unduly burden and destroy interstate commerce performed by private carriers of property by motor vehicle, whereby such private carriers are deprived of their property without due process of law.

STATUTES INVOLVED.

Statutory provisions and administrative regulations involved are as follows:

Part II, Interstate Commerce Act, 49 Stat. L. 543, as amended, U. S. Code, Title 49, Chapter 8, Secs. 301 et seq., pertinent portions thereof being attached hereto as Appendix A:

National Transportation Policy as enunciated by Congress (54 Stat. L. 899; U. S. Code, Title 49, Notes Preceding Sections 1, 301, 901 and 1001) attached hereto as Appendix B.

Act 367 of the Acts of Arkansas, 1941 (Arkansas Motor Carrier Act), pertinent portions being attached hereto as Appendix C.

Rules and regulations governing motor carriers promulgated by the Arkansas Corporation Commission, pertinent portions being attached hereto as Appendix D.

STATEMENT OF THE CASE.

Praefatio.

Inasmuch as there is no dispute with respect to any material fact of record we take the liberty of submitting this preliminary statement before complying with the rules of court by making specific reference to the pages of the transcript of record.

Petitioner, Lloyd A. Fry Roofing Company, hereinafter referred to as Fry, is the largest manufacturer and distributor of asphalt roofing products in the United States, having manufacturing plants at twenty-one places in the United States, from which it sells and distributes its products throughout the width and breadth of the forty-eight states. One of such plants is located at Memphis, Tennessee, from which plant petitioner sells and distributes its products to customers located in a number of points in Arkansas and other states.

In the fall of 1949, as a part of a newly adopted pricing and distribution method and system, Fry, in order to eliminate warehousing problems and circumvent inherent disadvantages attendant upon existing transportation facilities, began making delivery of its products by the use of motor vehicle equipment consisting of tractor-trailer units leased by it under the terms of long-term leases and operated by drivers employed, directed and controlled exclusively by Fry.

Under this system Fry leased motor vehicle equipment from Frank E. Whittington, Inc., a company at Memphis, Tennessee, hereinafter referred to as Whittington, which was engaged in the leasing and maintenance of motor vehicle equipment for industries engaged in the transportation

of the goods manufactured and distributed by such industries.

Of the equipment leased to Fry by Whittington, and used by Fry in the transportation herein involved, Whittington owned all trailers and approximately fifty per cent of the tractors; the remaining fifty per cent of the tractors were leased by Whittington from individual owners thereof and then by Whittington included in its fleet of equipment leased to Fry under its long-term equipment lease with Fry. The individual owners of these tractors were employed by Fry as truck drivers, exactly on the same basis as other truck drivers were employed, with Whittington having no connection with the employment of the drivers by Fry, nor with Fry having any connection with the lease of the tractor units to Whittington by the owners thereof. The relation between Fry and the drivers was a true employer-employee relation, and Fry at all times has had and exercised exclusive control over the drivers and leased equipment, regardless of by whom owned.

The operation of motor vehicle equipment and transportation of merchandise in Arkansas by Fry is and has been wholly interstate in character. The only merchandise transported in Arkansas by Fry or its drivers consisted of merchandise manufactured by Fry at Memphis, Tennessee, and wholly owned by it, being delivered to its customers in Arkansas, or raw materials being returned from Arkansas to Memphis for Volney Felt Mills, without profit to Fry, Volney being a wholly-owned subsidiary of Fry Roofing Company, whose operations at Memphis were under the entire direction and control of Fry.

Simply because Fry's drivers owned the tractor portion of the tractor-trailer being operated in the transportation of Fry's merchandise, representatives of the Arkansas Public Service Commission made a number of arrests of such

drivers, impounded all motor vehicle equipment being operated by them, as well as the merchandise thereon, and averred their intention to continue so to do. Thereby Fry's operations in interstate commerce were unduly burdened and hindered, it was precluded from conducting its lawful business in the sale and distribution of its merchandise, its property was being destroyed, and it was being irreparably injured.

As a result of this unlawful action on the part of representatives of the Arkansas Public Service Commission Fry instituted an injunctive action in the Chancery Court of Pulaski County, Arkansas, resulting in a decree on the 16th day of April, 1951 (R. 223), enjoining and restraining the Arkansas Public Service Commission from illegally interfering with the interstate transportation by the Lloyd A. Fry Roofing Company of its own commodities and those of a wholly-owned subsidiary through the use of motor vehicle equipment leased by it and operated under its exclusive direction and control by its employees, under the illegal guise of enforcement, through criminal action, of the Arkansas Motor Carrier Act, Act 367 of the Acts of 1941.

The charges against Fry's drivers were that they were "contract carriers" as defined by the Arkansas Motor Carrier Act of 1941 (pertinent portions attached as Appendix C).

Only those drivers employed by Fry who owned the tractor portion of the motor equipment involved were arrested, and it is not denied that the transportation service they were performing, as well as all elements of their employment by Fry, were identical with those of all other drivers employed by Fry who did not own tractors. These drivers who were arrested were charged with being "contract carriers" within the meaning of the Arkansas Motor Carrier Act (Appendix C).

The Chancery Court of Pulaski County, Arkansas, in an exhaustive decree containing findings of fact and conclusions of law, held that a bona fide employer-employee relationship existed between Fry and its truck drivers, that Fry was a bona fide lessee of the equipment operated by it, and that Fry was a private carrier by motor vehicle of its own merchandise and that of a wholly-owned subsidiary in interstate commerce (R. 219-223). On appeal the Supreme Court of Arkansas, in a divided opinion, pretermitted findings of material facts and, as we shall demonstrate, without any basis whatsoever in the record, concluded that the equipment leasing arrangement employed by Fry was a scheme and a subterfuge to avoid some regulation which the State of Arkansas might lawfully impose upon the transportation involved. Before turning to the record we reiterate that the decision of the Supreme Court of Arkansas could have been reached only by (1) totally ignoring all the undisputed and material facts of record and (2) the principles of law applicable thereto.

And now, to make specific reference to the record establishing accuracy of the foregoing statements (R. 45, 46), Fry is the largest composition asphalt roofing manufacturer in the United States, at the time of the trial below having nineteen plants located throughout the United States. One of such plants is located at Memphis, Tennessee, from which point roofing is sold and delivered to points in a number of states, including the State of Arkansas. It has a wholly-owned subsidiary, Volney Felt Mills, Inc., which manufactures felt for use by Fry; the operations of Volney are on Fry's premises and are conducted under the direction of Fry's supervisory personnel. The officers and directors of the two corporations are the same (R. 45, 46, 95).

In November, 1949 (R. 116), in connection with a new pricing and merchandising program and in order to enjoy the inherent advantages of the new program and over-

come disadvantages of existing transportation facilities (R. 83-86), Fry determined to deliver its products by utilization of a fleet of motor tractor-trailer units, to be operated by its employees, in the exclusive possession of and under the exclusive and sole direction and control of Fry. Fry, at the same time, did not wish to purchase or maintain the required motor vehicle equipment (R. 62-63, 69, 77-78, 82-83). These motor vehicle units were leased from Frank E. Whittington, Inc., a motor vehicle leasing and maintenance service (R. 23), under long-term written leases, compensation for use thereof being paid upon the basis of running miles (R. 7-14, 25, 70-71, 87-95). At all times and in every respect equipment leased by Fry from Whittington was under the sole and absolute direction and control of Fry (R. 87-88).

At the time of the trial in the lower court in Arkansas, Fry, at Memphis, was leasing eighteen trailers and twelve tractors from Whittington; Whittington owned all of the trailers, same being specially constructed for Fry's use, and seven of the tractors (R. 24, 71, 74-75, 85). Five of the tractors leased by Fry from Whittington were owned by persons employed by Fry as drivers, these persons having leased the tractors to Whittington under written long-term leases, with Whittington then having incorporated same in the fleet of equipment leased by Whittington to Fry under and pursuant to the terms of Whittington's equipment lease agreement with Fry (R. 24, 34-36, 7-14, 70-71).

Infra we shall summarize the terms and provisions of the equipment leases referred to above, but at this point we wish to point out, as established by the record, that Fry had no connection with, control over or knowledge of arrangement between Whittington and person employed by him who were owners of tractors leased to Whittington (R. 76, 100). The record establishes, as well, that Whittington had no connection with employment of drivers by

Fry, and neither did Whittington exercise any supervision over such drivers (R. 32, 38, 63, 105). There was no agreement that drivers employed by Fry would be assigned to the operation of equipment which they might own (R. 38, 76, 87), but, as a matter of sound business practice, when Fry learned that an employee owned equipment which was in its leased equipment fleet, Fry endeavored to assign such employee to the operation thereof (R. 103-104). At no time has it been any concern of Fry as to who owned the equipment which it had leased from Whittington (R. 76). Truck drivers employed by Fry, even though they may own tractors which are in Fry's leased equipment fleet, do not always operate the equipment owned by them (R. 86), and Whittington has absolutely no connection with or control over the equipment leased by Whittington to Fry, nor any direction or control over any driver of such equipment (R. 38-42).

Three forms of equipment leases are in the record, two of which, at various stages, governed the relation between Whittington and the individuals from whom he leased equipment. The third is the equipment lease agreement which, at all times, has been extant between Fry and Whittington. It is the position of Fry that the forms of the equipment leases utilized by Whittington are immaterial in this litigation inasmuch, as we will point out in argument, Fry had no connection therewith and, the first form of equipment lease had been abandoned before institution of the injunctive proceeding in this case. We shall endeavor, further, to point out that utilization of either of the forms was legal under the circumstances and could not justify the action of the respondents herein. The first form of lease utilized by Whittington appears at pages 27-31 of the record; the second form, executed between Whittington and the owners of equipment, and which agreement was in effect when the litigation herein was instituted, appears at pages 34-36 of the record.

The foregoing equipment lease (R. 34 et seq.), being the form of lease utilized by Whittington in its relations with the owners of equipment, establishes ownership of the equipment, recognizes that Whittington is engaged in furnishing motor vehicle equipment under lease to industrial concerns who wish to use same in the transportation of their own property, and that Whittington as lessee wishes to acquire lessor's equipment for such use and purpose; the equipment leased is specifically described; the right to sub-let the equipment is specified; responsibility for maintenance and cost of operation is included; the consideration for the lease is detailed; the duties of lessor with respect to painting, cleaning and polishing are outlined. The lessor agrees to keep in force fire, theft and collision insurance on the equipment, and to maintain same in such manner as to comply with all safety requirements of regulatory bodies; and it is specifically provided that lessee or the concern to whom lessee may sub-let the equipment shall have the full, exclusive and complete use of the leased equipment during the time of the lease, said lease being for a period of three years, with lessee being specifically granted the exclusive authority to sub-lease such equipment to any person of lessee's choosing.

At this point, at the risk of being accused of invading the field of argument, we are constrained to observe that there is no essential difference between the lease being utilized by Whittington on and after March 1, 1950, and that previously utilized by it in the procurement of equipment (R. pp. 27 et seq.), except that in the original form utilized the owner of the equipment agreed to become an employee of Fry. We do not deem this feature to be of any significance, as we will hereinafter demonstrate.

The motor vehicle equipment lease between Whittington and Fry, appearing at pages 7-13 of the record, and this we present is the only agreement of consequence in this

litigation, provides that Whittington leases to Fry certain specifically described motor vehicle equipment, contracts to perform all functions with respect to maintenance and cost of the expense of operation thereof, make regular inspection thereof, furnish substitute vehicles for those out of service by virtue of need for repairs or service; the agreement details the method to be employed in computing compensation to which Whittington is entitled, and by a schedule thereto establishes the rate per mile to be paid for use of such equipment; Whittington, lessor, agrees to procure and maintain, only insofar as the vehicles leased are concerned, insurance against fire, theft, tornado, wind-storm and earthquake damage; lessee, Fry, agrees to procure and maintain adequate public liability and property damage insurance; lessee, Fry, agrees that such motor vehicle equipment will be operated only by its employees, which employees shall be competent to perform the functions assigned to them, and shall be selected, employed, controlled, paid and supervised exclusively by Fry; Fry agrees not to overload the equipment; Fry agrees not to operate the equipment leased in violation of law; and the usual terms with respect to delivery of the equipment at the expiration of the lease, or renewal thereof, are specified.

As is established by the record, a true employer-employee relationship existed between Fry and its truck drivers irrespective of whether they did, or did not own equipment, and there was no distinction whatsoever in the relationship between the petitioner and truck drivers who did or did not own equipment either in the method of employment, compensation or direction and control exercised by Fry over the equipment and truck drivers. Fry's record with respect to all individual drivers involved in the litigation below are exhibits to the official transcript and it is stipulated that these records are representative of the records on employment of all truck drivers by Fry (R.

69-70); by further stipulation only one set of such records has been printed for consideration by this court (R. 241), the stipulation setting forth the reason, in each instance, for the omission of an exhibit in printing.

With respect to all drivers, uniform employment applications are required by Fry (R. 47, 185); Fry conducts investigation as to character and ability and requires a medical examination by a physician of its choice (R. 48); fidelity bonds are required of all truck drivers, with the premiums being paid by Fry (R. 49, 186); all truck drivers are compensated on the basis of so much per running mile, with incidentals, irrespective of cargo, and carried on petitioner's payroll as employees irrespective of whether they do or do not own equipment (R. 50, 57, 188); Fry deducts social security and withholding taxes on all drivers as employees, and carries workmen's compensation insurance on the drivers and pays the premiums therefor; all truck drivers get the benefit of Fry's uniform vacation plan, and the drivers participate, at their election, in group insurance available only to employees of Fry (R. 58, 60, 67, 101); the truck drivers, irrespective of whether they do or do not own equipment are paid by the use of regular employee pay checks (R. 60, 109); Fry alone employs and discharges truck drivers, gives no consideration to whether an applicant for employment owns or does not own motor vehicle equipment, and determines the compensation to be paid to truck drivers which, in all instances, is uniform; there is no difference in compensation paid truck drivers whether they do or do not own equipment, nor is there any variation in the rate paid per running mile depending on the type, character or weight of cargo being transported (R. 61-62).

Fry alone determines when, where, how and what will be transported in leased equipment and by the drivers thereof; Fry does not permit the use of such equipment

for any purpose other than its own, nor its drivers to be employed by any other person (R. 62-63, 69). The drivers have no discretion as to the equipment they will operate (R. 77).

Fry assumes full responsibility for operation of the vehicle as well as safety of cargo, and complies with all of the hours of service and safety regulations of the Interstate Commerce Commission applicable to private carriers (R. 63-66, 77-78, 110, 190).

Neither bills of lading nor way bills are used by Fry in the transportation and delivery of its commodities, a simple delivery ticket being employed (R. 66, 191); reports of defects in equipment being operated by Fry's drivers are made directly to Fry by the drivers and to no other person (R. 68, 192).

Insofar as the State of Arkansas and the issues at bar are concerned, all transportation performed by Fry and its drivers is interstate transportation (R. 45-46); being from Memphis to points in Arkansas of Fry's own merchandise or of raw materials for Volney Felt Mills, Inc., from points in Arkansas to Memphis, Tennessee; no charge is made by Fry for this transportation for its wholly-owned subsidiary (R. 95-96, 116).

The primary business of Fry is the manufacture and distribution of asphalt roofing and during the period in suit utilization of the transportation method under attack resulted in a substantial deficit (R. 78-79, 112-115, 245), but the advantages were thought to justify continuation thereof.

As is reflected by the record, under the guise of enforcing the Arkansas Motor Carrier Act, representatives of the Arkansas Public Service Commission arrested a num-

ber of Fry's drivers making interstate deliveries, impounded and delayed its merchandise and equipment, prevented fulfillment of its contracts with its customers, and averred their contention to continue so to do unless enjoined by the court. Also, as is reflected by the record, no question of taxation or exercise of police power is presented, the sole issue being whether contract carriage was being performed by Fry's drivers without a permit as contract carriers from the Arkansas Public Service Commission (R. 112, 122-136, 138). Only those drivers who owned the tractors then being operated by them as Fry's employees were arrested and no issue has been made by the Arkansas Public Service Commission as to the legality of identical transportation being performed by Fry's drivers who did not own tractors.

Following the repeated arrest of Fry's employees an injunctive action was instituted (R. 1-13) and tried in the Chancery Court for Pulaski County, Arkansas, in which the chancellor made comprehensive findings of fact and conclusions of law (R. 219-223), holding that Fry's equipment leases were bona fide, had been strictly adhered to, that a true employer-employee relationship existed between Fry and all of its truck drivers, and that Fry was a private carrier.

The Arkansas Public Service Commission was enjoined from interfering with Fry or its employees in performance of the described transportation upon the theory that common or contract carriage was being performed (R. 223).

The Supreme Court of Arkansas, on appeal by the Arkansas Public Service Commission, with two justices dissenting (R. 232), reversed the decree of the Chancery Court (R. 225) and held that Fry's drivers who owned tractors which had been leased to Fry through Whittington were contract carriers and perforce must obtain Arkansas

contract carrier permits before they could transport Fry's goods in interstate commerce, and that they were subject to prosecution for violation of the provisions of the Arkansas Motor Carrier Act for having failed so to do. Petition for rehearing was duly filed (R. 234), and denied (R. 237).

As has heretofore been pointed out, prior to approximately March 1, 1950, Whittington employed one form of lease in procuring equipment from the owners thereof (R. 25-31) and subsequent to such date utilized another form (R. 25, 33-36). While Fry had no connection with or knowledge of arrangements between Whittington and the owners of equipment (R. 76, 100); it should be noted that the opinion of the court below is predicated upon analysis of a form of equipment lease not being used when the litigation was instituted or tried, and that as well, the feature of the initial form employed by Whittington found particularly objectionable by the court below, i. e., that the equipment owner procure employment with Fry, was never enforced by Whittington in his relations with the owners of equipment (R. 38, 76, 87), and was omitted entirely in the second form.

All terms and conditions of the written agreement between Whittington and Fry were scrupulously complied with in actual operation (R. 89).

SPECIFICATION OF ERRORS TO BE URGED.

1. Fry is being discriminated against and deprived of its property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Interstate commerce is being unduly burdened and destroyed contrary to the provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States.

3. The Arkansas Public Service Commission is unlawfully attempting to regulate interstate motor carrier transportation, a field pre-empted by Congress.

4. The lower court erred in not considering whether Fry is a private carrier whose primary business is the manufacture and sale of its products, and in not holding that the transportation of Fry's products could not, at one and the same time, be both private and contract carriage.

5. The lower court erred in not considering whether a bona fide employer-employee relationship existed between Fry and its truck drivers, and in not holding that, in the transportation of Fry's products the truck drivers could not, at one and the same time, be both bona fide employees and contract motor carriers.

6. The lower court erred in not considering that no element of interstate contract motor carrier transportation was present in the relationship between Fry and its drivers and in the transportation of Fry's products.

7. The lower court erred in considering that ownership of motor vehicle equipment was determinative of whether contract carriage was being performed therewith, and in failing to consider the extent to which Fry exercised con-

trol over the equipment and driver thereof as being material in determining the type carriage being performed.

8. Fry's equipment leases were bona fide, scrupulously observed in actual operation, and were not adopted to avoid compliance with the Arkansas Motor Carrier Act.

9. No weight has been given by the court below to decisions of the Interstate Commerce Commission relating to interstate commerce. They are entitled to great weight.

10. Under the undisputed facts of record the only permit which the Arkansas Public Service Commission might lawfully grant would be for the performance of intrastate transportation, whereas the only transportation involved is interstate.

11. The decision below is predicated on a factual basis having no support in the record.

SUMMARY OF ARGUMENT.

Petitioner, Lloyd A. Fry Roofing Company, is a large manufacturer and distributor of asphalt roofing products; as a part of a new merchandising and distributing program it determined to distribute its products by the use of motor vehicle equipment operated by its employees under its exclusive direction and control; such motor vehicle equipment was procured on the basis of long-term equipment leases from an equipment leasing and maintenance organization. The equipment consisted of tractors and specially constructed trailers, rental therefor being paid on the basis of running miles, irrespective of cargo transported therein.

The only goods transported in leased equipment were goods owned by Fry or a wholly owned subsidiary, the latter transportation being performed without cost to the subsidiary, and the over-all transportation operation was performed at a loss. Insofar as this litigation is concerned the only transportation performed by the use of leased equipment was wholly interstate in character.

Fry had and exercised exclusive direction and control over leased motor vehicle equipment, regardless of by whom owned, and directed when and how same was to be operated, the cargo to be transported thereon, and assumed complete responsibility for the cargo thereon and the operation thereof.

Fry employs a number of truck drivers, a portion of whom own tractors which they lease to the equipment leasing and maintenance service subscribed to by Fry, this service incorporating such tractors in the fleet of equipment leased to Fry by the service. Whether an applicant for employment as a truck driver owns motor vehicle equipment is of no concern to Fry, and Fry has no knowl-

edge of or connection with relations between the equipment leasing service and the individual owner of a tractor. The employment of all truck drivers by Fry is on exactly the same basis, irrespective of whether they do or do not own equipment, and, in all respects, a true employer-employee relationship exists between Fry and all of its truck drivers, all of whom are compensated on the basis of so much per running mile, union scale, and all of whom are, in identically the same manner, supervised, directed and controlled by Fry.

Congress has enacted what is popularly known as Part II of the Interstate Commerce Act, pre-empting the field of interstate motor carrier transportation. Pursuant to the authority granted by Congress, the Interstate Commerce Commission has promulgated rules and regulations governing interstate motor carrier transportation. The Interstate Commerce Act contains definitions of common, contract and private motor carriers. In the case at bar we are concerned with the definitions of contract and private carriers as set forth in said Act, and they are attached hereto as Appendix A.

In 1941, as Act No. 367 of the Acts of Arkansas, the legislature of Arkansas enacted what is popularly known as the Arkansas Motor Carrier Act, designed to regulate intrastate transportation in Arkansas. Pertinent portions of this Act are attached as Appendix C. It is to be noted that the Arkansas Act contains no definition of "private carrier," but that by Section 5 (b) thereof it is specifically provided that the Act shall not be construed to include "any private carrier of property." The Arkansas Act, further, by Section 25 thereof, provides that it shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

In the early part of 1950 the Arkansas Public Service Commission launched upon a program of harassment of Fry's operations, arresting its drivers, impounding its equipment, and preventing fulfillment of its contracts with its customers for the delivery of goods in interstate commerce by arresting its drivers for failing to have a contract carrier permit issued by the Arkansas Public Service Commission. This molestation of Fry's interstate operations was enjoined following a chancery court proceeding, and the decree of the chancery court was reversed by the Supreme Court of Arkansas, in a divided opinion.

The principal bases of our argument shall be that the respondents herein, a state regulatory body, under a statute designed to permit regulation of intrastate commerce, are invading the field of interstate motor carrier transportation, which field has been pre-empted by Congress; (2) that interstate commerce is being unduly burdened and destroyed; (3) that Fry is being deprived of its property without due process of law; (4) that Fry is a private carrier within the meaning of the Interstate Commerce Act and, perforce, at one and the same time its truck drivers cannot be contract carriers in transporting its products; (5) that a bona fide employer-employee relationship exists between Fry and its truck drivers and that, such being the case, while acting as employees of Fry the truck drivers cannot at one and the same time be contract carriers; that the court below failed to take cognizance of or apply the "primary business" test enunciated by this court in determining whether private or contract carriage was being performed and, as well, failed to give any weight whatsoever to decisions of the Interstate Commerce Commission relating to interstate motor carrier transportation.

As an incidental issue we shall take the position that the opinion of the majority of the court below is predicated on a factual basis having absolutely no support in the record.

ARGUMENT.

We beg leave to state, in limine, that we realize the number of errors specified to be urged is unusually large, but respectfully present that the specification is a conservative presentation of the errors committed by the Supreme Court of Arkansas.

In view of the importance of the principles involved, not only to the petitioner in this case, but to the private motor carrier industry at large, and also to a proper determination thereof as an aid to the Interstate Commerce Commission in enforcement of Part II of the Interstate Commerce Act and as an aid to the regulatory bodies of the 48 states, all of whom have statutes comparable to that of the State of Arkansas governing motor carrier transportation, we plead the indulgence of the court in presentation of our views with respect to the numerous errors specified.

The court, we believe, will take judicial notice of the fact that motor carrier transportation constitutes a very important segment of the over-all transportation system of the nation. The significance of private motor carrier transportation was graphically portrayed by representatives of the Private Carrier Conference of the American Trucking Association in hearings before the Committee on Interstate and Foreign Commerce, United States Senate, 82nd Congress, 2nd Session, on "Bills Relative to Domestic Land and Water Transportation,"¹ on March 3 to April 9, 1952, in which it was established that as of that time private carriers of property had in operation 4,358,000 units of motor vehicle equipment, excluding farm and government vehicles, or a total of 77.6% of all motor transportation vehicles being operated in the United States. At the same

¹ "Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Congress, 2nd Session, on Bills Relative to Domestic Land and Water Transportation," March 3 to April 9, 1952, pages 685 et seq.

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time for-hire carriers had 1,258,000 units in operation, or a total of 22.4% of the total number of motor vehicles transporting property in the United States.

Thus, the decision of this court in this case will be determinative of the rights of all state regulatory bodies to exercise supervision over interstate transportation which is being performed by private carriers operating 4,358,000 units of motor vehicle equipment to the extent that such operations are performed by the use of leased equipment.

Our principal thesis shall be that the "primary business" test as enunciated by this court and the Interstate Commerce Commission determines whether a carrier is a private carrier; that the direction and control of the equipment and the driver thereof by the carrier rather than ownership of equipment is determinative of the status of the carrier, and that a person at one and the same time cannot be a bona fide employee of a private carrier, as such term is defined by the Interstate Commerce Act, and a contract carrier, as such term is defined by state legislation; and, to state the same premise differently, if an employee is a contract carrier under state legislation, then his employer cannot be a private carrier as such term is defined by federal legislation.

At this point, and in order to avoid repetition hereinafter, we respectfully direct the attention of the court to the pertinent statutory provisions involved. As Appendix "A" we quote from Part II of the Interstate Commerce Act, Title 49, U. S. Code, sections 301 et seq., containing the definitions of "contract carrier by motor vehicle," "private carrier of property by motor vehicle," and the general sections of the Act relative to the duties of the Interstate Commerce Commission with respect to such carriers; then, as Appendix "B," we quote the "National Transportation Policy Enunciated by Congress," U. S.

Code, Title 49, notes preceding sections 1301, 901 and 1001; then, as Appendix "C," we quote pertinent portions of the Arkansas Motor Carrier Act, Act 367 of the Acts of Arkansas, 1941, and direct attention to the fact that such Act specifically provides that nothing therein shall be construed to include any private carrier of property, and that it contains no definition of private carrier of property. Then, as Appendix "D," we quote from regulations of the Arkansas regulatory body, from which it will be seen that an application for an interstate contract carrier permit must be accompanied by a copy of authority granted by the Interstate Commerce Commission, with no other provision being made for the granting by the Arkansas regulatory body of interstate contract carrier operating authority except upon the conditions quoted.

The Decision Below Sanctions Invasion by a State of a Field of Interstate Commerce Pre-empted by Congress.

The transportation involved in this litigation is solely interstate motor carrier transportation of property. No intrastate transportation has been or is proposed to be performed, and the attempt by the state to regulate this transportation is perforce an attempt to regulate interstate transportation.

Article 1, Section 8, Clause 3 of the Constitution of the United States provides:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It has long been the fundamental law of the land that no part of the power to regulate commerce that is vested in Congress can be executed by a state and that such power, so far as it is thus vested belongs exclusively to Congress. **Gibbons v. Ogden**, 22 U. S. 1, 6 L. Ed. 23.

And it is fundamental law, as well, that the Commerce Clause of the Constitution of the United States establishes the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority, and that authority is the Congress of the United States. **Edwards v. People of the State of California**, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119; **Milk Control Board v. Eisenberg Farm Products**, 306 U. S. 346.

It is established, as well, that whenever Congress exercises its power to regulate commerce between the states all conflicting state laws must give way, **Huison v. Lott**, 75 U. S. 148, 19 L. Ed. 387; **U. S. v. Hill**, 248 U. S. 420, 63 L. Ed. 337, and that when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states can no more supplement its requirements than they can annul them. **Pennsylvania R. v. Public Service Commission of Penn.**, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142.

And stated differently, the elementary and long settled doctrine is that the moment Congress exercises its paramount and all-embracing authority in the regulation of interstate commerce the power of the state with respect thereto ceases to exist, because there can be no divided authority over interstate commerce, and the regulations of Congress on that subject are supreme. **Chicago, Rock Island and Pacific R. Company v. Hardwicke Farmers' Elevator Company**, 226 U. S. 466; and where Congress has by an expression of its will occupied a field that action is conclusive of any right to the contrary asserted under state authority. **State of Wisconsin v. City of Duluth**, 96 U. S. 379, 24 L. Ed. 668.

Furthermore the power and acts of Congress with respect to regulation of interstate commerce are established

to be exclusive. **Missouri Pacific R. v. Stroud**, 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683; **City of Newark v. Central R. of New Jersey**, 267 U. S. 377, 45 S. Ct. 238, 69 L. Ed. 663.

And it is equally well established that a state may not enforce any law, the necessary effect of which is to prevent, obstruct or burden interstate commerce. **LaCoste v. Department of Conservation of the State of Louisiana**, 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437; **Schwab v. Richardson**, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183.

• "Burdens upon interstate commerce" are those actions of a state which directly impair the usefulness of facilities for such commerce, **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, and a state may not regulate or create a burden of traffic in interstate commerce. **United States v. Whiting Milk Company**, 97 F. (2d) 667; **McDermott v. Wisconsin**, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754; **Savage v. Jones**, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182. Nor may states lawfully enact or endeavor to enforce measures tending directly to regulate, obstruct or interfere with commerce confided to paramount control of Congress or which may be inconsistent with federal legislation. **Ziffrin Inc. v. Martin**, 24 F. Supp. 924, affirmed 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

If, therefore, it is established that the commerce involved is interstate commerce, that the field thereof has been pre-empted by Congress, and that such commerce is being burdened, hindered and obstructed by officials of the State of Arkansas, under the guise of deeming such commerce to be contract motor carrier transportation within the meaning of a state statute, then the decision of the Supreme Court of Arkansas should be reversed. We present that the Congress has pre-empted the field of interstate contract motor carrier transportation.

On the 9th day of August, 1935, and as amended from time to time, Congress enacted Part II of the Interstate Commerce Act, and thereby fully pre-empted the field of interstate motor carrier transportation. This part of the Interstate Commerce Act appears as Title 49, U. S. Code, Sections 301 et seq. We do not cite the Statutes at Large at this point inasmuch as we believe such would be unduly burdensome to the Court. Insofar as contract carriage is concerned, Title 49, U. S. Code, Section 303 (15), 54 Stat. L. 920, defines same to be:

“The term ‘contract carrier by motor vehicle’ means any person which, under individual contracts or agreements, engages in transportation (other than transportation referred to in paragraph (15) of this section and the exception therein) [common carrier transportation] by motor vehicle of passengers or property in interstate or foreign commerce for compensation.”

The same section at sub-section (17) defines “private carrier” as follows:

“The term ‘private carrier of property by motor vehicle’ means any person not included in the terms ‘common carrier by motor vehicle’ or ‘contract carrier by motor vehicle,’ who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in furtherance of any commercial enterprise.”

By U. S. Code, Title 49, Section 304 (2), the Congress provided that it should be the duty of the Interstate Commerce Commission

“to regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to

uniform systems of accounts, records, and reports, presentation of records, qualifications and maximum hours and service of employees, and safety of operation and equipment."

And further, by U. S. Code, Title 49, Section 304 (6), 52 Stat. L. 1237, the Interstate Commerce Commission is empowered:

"To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration . . ."

There then follows an enumeration of various powers of the Commission with respect to regulation of interstate motor carrier transportation, with the specific provision at U. S. Code, Title 49, Section 304 (c), 54 Stat. L. 922:

"Upon complaint in writing to the Commission by any person, state board, organization or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission after notice and hearing find upon investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

And then, in the immediately following sub-section, it is provided:

"The provisions of sections 14 and 16 (13) of part I relating to reports, decisions, schedules, contracts, and

other public records, shall apply in the administration of this part."

Without further quotation from Part II of the Interstate Commerce Act, it should be pointed out that the following sections of Title 49 of the United States Code reflect the extent to which Congress has pre-empted the field of interstate motor carrier contract transportation. At section 309 Congress has invested the Interstate Commerce Commission with authority to issue permits covering contract motor carrier transportation, prescribed the powers of the Commission with respect thereto and established procedures to be followed; at section 318 of said Title, Congress has covered entirely the questions of contracts by contract carriers by motor vehicle, minimum rates and charges, the filing of contracts with the Interstate Commerce Commission, publishing and keeping open for inspection in manner and form prescribed by the Commission of schedules containing minimum rates or charges, reductions in charges, and the powers of the Commission with respect thereto. This section, as well, delineates the authority of the Commission to regulate contract carrier transportation, investigate complaints with respect thereto, and to modify, suspend, or cancel contract carrier permits. Further, at section 234 of said Title the Interstate Commerce Commission is invested with authority to prescribe the accounts, records and memoranda to be kept by contract motor carriers as well as reports to be made thereon and the forms thereof. And, as will appear from Title 49, Chapter 1, sub-chapter B, Parts 165 et seq. of the Code of Federal Regulations, the Interstate Commerce Commission has, to the full extent of its authority, promulgated rules and regulations covering every feature and phase of interstate contract motor carriage.

It having been demonstrated, therefore, that Congress has pre-empted the field of interstate motor transportation,

that under Article 1, Section 8, Clause 3 of the Constitution of the United States it has the exclusive power and authority to regulate such transportation, that the Interstate Commerce Commission has made no charge, complaint or ruling that petitioner is other than a private carrier within meaning of the Interstate Commerce Act, and that officials of the State of Arkansas, attempting to regulate such transportation under and by virtue of the contract carrier features of the Arkansas Act are hindering, delaying, obstructing and unduly burdening interstate commerce, and that petitioner is thereby being deprived of its property without due process of law, it results that the decision of the Supreme Court of Arkansas should be reversed.

At this point it should be noted that the Supreme Court of Arkansas bases its decision upon the conclusion that Section 5 (a) (8) of the Arkansas Motor Carrier Act, the definition of "contract carrier" was intended to be "all inclusive" (R. 226). In the first place, such finding is negated by the numerous exclusions contained in section 5 (b) of the Act itself as well as by section 25 thereof. Among other things, section 5 (b) (3) specifically provides that the Act shall not apply to any private carriers, and section 25 permits application thereof to interstate commerce only insofar as such application will be permitted by the provisions of the Constitution of the United States and Acts of Congress (Appendix C):

If it was the intention of the drafters of the Arkansas Motor Carrier Act that the definition of contract carrier should be "all inclusive," and if the construction placed thereon by the Arkansas Supreme Court is correct, then in that event the Act on its face is unconstitutional in that it seeks to invade a field wholly pre-empted by Congress.

**The Decision of the Court Below Permits Interstate
Commerce to Be Unduly Burdened, Interfered
With, Hindered and Destroyed.**

It is established by the record that Fry and its drivers were engaged solely in interstate commerce, and that by the action of the representatives of the state regulatory body it was prevented from selling and delivering its merchandise in interstate commerce and fulfilling contracts with its customers; it is admitted of record, as well, that in each instance when petitioner's drivers were arrested they were engaged in the performance of interstate transportation, and that respondents propose to continue such arrests and prevent petitioner from delivering its goods by the means employed and performance of its contracts, unless enjoined from so doing.

It is respectfully presented that by the foregoing actions and threatened actions of the representatives of respondents that interstate commerce, contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States, is being unduly burdened, hindered and destroyed by a state regulatory body in the enforcement of a state statute designed to permit the regulation of intrastate commerce.

The decisions of this court well establish that a state may not enforce any law, or enforce any law in a manner the necessary effect of which is to prevent, obstruct or burden interstate commerce, a burden upon interstate commerce being any action of the state which directly impairs the usefulness of facilities for such commerce. It cannot be denied that by the arrests of petitioner's drivers and delay and impoundment of its equipment the interstate commerce in which petitioner was engaged was being burdened and hindered by the attempted enforcement of the Arkansas Motor Carrier Act by the respondent therein. The decision of the court below, in approving such action,

is perforce contra to the decisions of this court enunciating the foregoing principles. **LaCoste v. Department of Conservation of the State of Louisiana**, 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437; **Schwab v. Richardson**, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183; **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; **McDermott v. Wisconsin**, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754; **Savage v. Jones**, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182.

It is obvious that, if the decision of the court below is correct, no private carrier of property, regardless of its primary business and regardless of the extent to which it exercises direction and control over the driver and operation of leased equipment, may perform interstate transportation in the delivery of its products without its employees procuring contract carrier permits from state regulatory bodies. Such, we present, unduly burdens, interferes with, hinders and destroys interstate commerce.

**The Court Below Gave No Weight to Decisions of the
Interstate Commerce Commission—No Element
of Interstate Contract Motor Carrier
Transportation Is Involved.**

This court has plainly said that in matters of interstate transportation the opinions of the Interstate Commerce Commission are entitled to great weight. **U. S. et al. v. American Trucking Assoc.**, 310 U. S. 534, 60 S. Ct. 1059; **Levinson v. Spector Motor Service**, 330 U. S. 649. The admonition of this court in these cases was utterly ignored by the majority opinion below, but was recognized in the minority opinion (R. 225, 232).

It should be recalled that we are here confronted with a factual situation uncontradicted of record, and not found to be otherwise by the court below, where the owner of

motor vehicle equipment leased same to an intermediary equipment maintenance and leasing service which, in turn, leased same to a private carrier, the owner thereof being employed in a bona fide manner as an employee of such private carrier, and, at the will of the private carrier, drives the equipment owned by him. In **Watson Mfg. Co., Inc., Common Carrier Application**, 51 Motor Carrier Cases 223, the Interstate Commerce Commission had before it a situation where the owner of such equipment leased same directly to the carrier and was directly employed by the private carrier to drive his own equipment. In the **Watson** case, *supra*, the Interstate Commerce Commission specifically held that the owner of motor vehicle equipment could lease same to a private carrier and then be employed by the carrier as the driver thereof without becoming a contract carrier within the meaning of the Interstate Commerce Act [U. S. Code, Title 49, Section 303 (a) (15)]. Such Act is the only legislation applicable to the case at bar inasmuch as interstate transportation alone is involved. The foregoing decision of the Interstate Commission is not only entitled to great weight but should be controlling in determining whether interstate carriage in the case at bar is being performed.

Furthermore, the Interstate Commerce Commission has long since enumerated those aspects of motor carrier transportation which must be present before it can be said that contract carriage is being performed. It is significant that while the court below concludes that as a matter of law Fry's drivers are contract carriers within the meaning of the Arkansas Motor Carrier Act, that there is no factual finding by the court of **any single element** held by the Interstate Commerce Commission to be essential for motor carrier transportation to be interstate contract carriage.

For example, the Interstate Commerce Commission has held that interstate contract carriage entails the execution

of a mutual contract between carrier and shipper for a definite period of time, for the transportation of specific commodities in a definitely described territory or between specified points at specified filed and published minimum weights and charges; such contract containing minimum rates and charges must be approved by the Interstate Commerce Commission, and in such contracts the rights, duties and obligations of both carrier and shipper must be well defined, the shipper be obligated to furnish some definite or easily ascertainable amount of freight during the term of the contract, or for a given period, and the carrier bound to transport the freight agreed to be shipped for the consideration specified in the contract. See **Contracts of Contract Carriers**, 1 Motor Carrier Cases 628; **Filing of Contracts by Contract Carriers**, 2 Motor Carrier Cases 55; **Western Transport Co., Contract Carrier Application**, 2 Motor Carrier Cases 107.

The opinion of the court below does not allude to either the existence or non-existence of any of the foregoing elements, and it is undisputed of record that the only agreement between the petitioner and its truck drivers was an oral agreement of indeterminate duration under which the drivers were simply employed to drive trucks at the will of petitioner for a specified union rate per mile, and without regard to character or quantity of cargo to be transported or the destination thereof, but simply to act as truck drivers in transporting petitioner's goods if, as, when, where and how petitioner should elect and under petitioner's exclusive direction and control.

We respectfully submit that insofar as interstate motor carrier transportation is concerned, the foregoing decisions of the Interstate Commerce Commission are entitled to great weight, and that if given any weight whatsoever the decision of the court below cannot stand.

Petitioner Is Being Deprived of Its Property Without Due Process of Law.

It is respectfully presented that the decision of the court below sanctions actions of a state regulatory body which abridge the privileges of petitioner and deprive it of its property without due process of law.

No question of the legitimacy of petitioner's business being involved, nor of its compliance with all police tax and safety laws and regulations of the State of Arkansas, it is petitioner's position that it should be permitted to sell and deliver its goods in interstate commerce in motor vehicle leased to and operated by it with employees of its own choosing, without hindrance from the State of Arkansas until, by some state or federal court or governmental agency having jurisdiction, its operations shall have been held to be illegal. This has not been done.

If petitioner is a private carrier of goods solely in interstate commerce, then its employees also solely engaged perforce cannot be said to be contract carriers within the meaning of the Arkansas Motor Carrier Act.

The Arkansas Motor Carrier Act, being Act 367 of 1941, contains ample authority for the Arkansas Public Service Commission to conduct investigations thereunder and to enforce its provisions by application to the courts of Arkansas; similarly Part II of the Interstate Commerce Act, which we have discussed in detail, supra, invests the Interstate Commerce Commission with ample authority, either by complaint proceedings before the Commission itself or by civil or criminal actions instituted in the federal courts, to enforce the provisions of such Act upon carriers subject thereto engaged in interstate transportation.

It is significant that the status of Lloyd A. Fry Roofing Company as a private carrier with respect to the transpor-

tation herein involved has neither been challenged in administrative proceedings before any state or federal body, nor has any action been instituted against petitioner in any court challenging the status of Fry as a private carrier.

It is presented, therefore, that interference with petitioner's operations, by the indirect means of arresting its driver and impounding its equipment under a state statute, which action has been sanctioned by the decision of the court below, is in contravention of section 1 of the 14th Amendment to the Constitution of the United States, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Thus, without the validity of its operation having been challenged before any administrative body or tribunal having jurisdiction, by indirection in the attempted enforcement of a state statute, the rights and privileges of petitioner to engage in interstate commerce have been abridged and it is being prevented from fulfilling contracts and engaging in a legitimate enterprise in the sale and distribution of its products.

The Decision of the Court Below Contravenes the National Transportation Policy as Enunciated by Congress.

On September 18, 1940, as a part of the Interstate Commerce Act, the Congress enacted an amendment to the Act popularly known as the "National Transportation Policy" (54 Stat. L. 899, U. S. Code, Title 49, notes preceding sections 1, 301, 901 and 1001) which, in pertinent part, is reproduced herein as appendix B.

This statute requires fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, and we construe the statute to mean that the same standards will be applied in determining whether common or contract as distinguished from private motor carrier transportation is being performed.

The decision of the court below plainly contravenes such National Transportation Policy as enunciated by Congress, as well as decisions of this court handed down in implementation thereof.

The decision of the court below ignores entirely the undisputed fact that at all times the leased motor vehicle equipment was under the **exclusive** direction and control of Fry, and the decision below is obviously predicated on the sole question of ownership of equipment being operated by Fry's drivers. Thus, although no question is made by the pleadings or in the record but that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers (which fact the decision of the court below also entirely ignores) the practical effect of the decision below is that petitioner's employees driving their own equipment leased to petitioner are contract carriers, whereas the other truck drivers employed by it and supervised on exactly the same basis, are not affected by the contract carrier provisions of the Arkansas Motor Carrier Act.

We know of no decision of this court dealing directly with the question whether exercise of direction and control or ownership of motor vehicle equipment is determinative of whether contract carriage is being performed, but the Interstate Commerce Commission, as well as this court, in determining whether **common or other carriage** was being performed, and by whom, have held that the person who assumed full responsibility for the direction, operation and control of the equipment and acknowledged responsi-

bility to the public therefor, was the carrier, irrespective of ownership of the equipment. **Floyd H. Johnson-Extension**, 17 Motor Carrier Cases 733, 740; **Performance of Motor Common Carrier Service by Riss and Company, Inc.**, 48 Motor Carrier Cases 327, 359; **Thomson v. United States**, 321 U. S. 419, in all of which decisions the "control and responsibility test" was recognized as being determinative of the carrier status of affected persons.

The decision of the court below obviously applies solely the "ownership test" and ignores the "control and responsibility" test in determining whether contract carriage within the meaning of the Arkansas Motor Carrier Act was being performed.

We submit that, with respect to interstate commerce, neither the Congress, this court nor the Interstate Commerce Commission contemplated that in effectuation of the National Transportation Policy the "control and responsibility test" was to be applied in determining whether common or private carriage was being performed and that the "ownership test" was to be applied in determining whether contract or private carriage was being performed within the meaning of either the Interstate Commerce Act or the Arkansas Motor Carrier Act.

The Opinion of the Majority of the Court Below Ignored Undisputed Facts of Record and Is Based on Unwarranted Conclusions and Misapplication of Decisions of United States District Courts.

We do not take the position that this court should review findings of fact made by the Supreme Court of Arkansas. We do take the position, however, that the Supreme Court of Arkansas made no findings of fact on essential undisputed facts of record which, if considered at all, would have precluded the result below, and that the

decision below is predicated solely on conclusions having no factual basis in the record.

An examination of the opinion of the majority of the Supreme Court of Arkansas (R. 225 et seq.) will disclose that the court made no finding with respect to whether petitioner was or was not a private carrier exercising exclusive direction and control over motor vehicle equipment leased by it and of the drivers thereof; in the next place the court below made no finding as to whether a bona fide employer-employee relationship existed between petitioner and its truck drivers, irrespective of whether they own the equipment being operated by them; in the next place the court below made no finding with respect to whether or not the terms and conditions of Fry's equipment lease agreement was or was not scrupulously complied with in actual operations and, finally, the court below refused to consider whether the "primary business" test was of any significance in determining the issues at bar.

We deem consideration of the foregoing matters to be essential to a determination of whether the involved interstate transportation is private, contract or common carriage within the meaning of the Interstate Commerce Act. A review of the record in this case will conclusively establish that there is no conflict in the evidence with respect to any material fact determinative of the questions above, that the written equipment lease agreements were scrupulously complied with in actual operation, that a bona fide employer-employee relationship existed between petitioner and all of its truck drivers, and that petitioner was in truth and in fact a private carrier transporting its goods in interstate commerce.

It is respectfully presented that if petitioner, engaged solely in interstate commerce, is a private carrier within the meaning of the Interstate Commerce Act, and as a

matter of law and of fact if a bona-fide employer-employee relationship exists between petitioner and its truck drivers, then it would be impossible for petitioner's truck drivers at one and the same time and in the performance of the same transportation to be contract carriers within the meaning of the Arkansas Motor Carrier Act.

We believe it fundamental, as well, that the court should have taken into consideration the undisputed fact that petitioner had and exercised exclusive direction and control not only over the equipment operated by it and the cargo transported therein, but over the drivers thereof as well.

In this connection we respectfully present that we cannot conceive of a decision, upon the undisputed facts of record, being well-founded without a preliminary determination of whether the Lloyd A. Fry Roofing Company is in truth and in fact a private carrier within the meaning of the Interstate Commerce Act, U. S. Code, Title 49, section 303 (17), 54 Stat. L. 920 which category is therein defined as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle' who or which transports in interstate or foreign commerce by motor vehicle property by which such person is the owner, lessee, or bailee, and such transportation is for the purpose of sale, lease, rent, or bailment or in furtherance of any commercial enterprise."

There is no question in the record but that at the times petitioner's drivers were arrested they were transporting petitioner's goods in equipment being operated under petitioner's exclusive direction and control. Neither is there any question in the record but that at such times such

goods were owned by petitioner and were being transported "by petitioner as the owner thereof for the purpose of sale."

We inevitably, therefore, come to the question of determination of whether petitioner was a private carrier within the meaning of the Interstate Commerce Act. This court has established the principle that the primary business of an establishment delivering goods by the use of motor vehicle equipment determines whether it is a private, contract or common carrier. Such, as well, has been the consistent ruling of the Interstate Commerce Commission with respect to interstate motor carrier transportation. The decision of the court below is based upon a refusal to consider applicability of the "primary business" test enunciated by this court and the Interstate Commerce Commission. In **Brooks Transportation Co. et al. v. United States of America et al.**, 93 F. Supp. 517, affirmed per curiam 340 U. S. 925; **Lenoir Chair Company—Contract Carrier Application**, 48 Motor Carrier Cases 259, and **Schenley Distillers Corp.—Contract Carrier Application**, 48 Motor Carrier Cases 405, it was clearly established that if the primary business of the carrier is that of the manufacture, sale and distribution of its products, rather than transportation, that it is not a contract carrier within the meaning of the Interstate Commerce Act.

It is uncontradicted of record, although this fact was not alluded to by the court below, that the only transportation being performed by petitioner or its drivers was of goods owned by petitioner or its wholly-owned subsidiary Volney Felt Mills; that such transportation was being performed at a loss to petitioner and with no charge being made to the subsidiary for the incidental transportation performed on its behalf.

Clearly, then, under the decisions of this court and of the Interstate Commerce Commission the Lloyd A. Fry

Roofing Company is a private carrier of property within the definition of such term contained in the Interstate Commerce Act, inasmuch as its primary business is the manufacture and sale of asphalt roofing products and not motor carrier transportation.

It results, therefore, that had the foregoing applicable principles been applied to the undisputed facts of record petitioner's drivers, in transporting petitioner's products, with petitioner being a private carrier, could not at one and the same time be contract carriers within the meaning of the Arkansas Motor Carrier Act.

In the next place, the Supreme Court of Arkansas failed to consider whether a bona fide employer-employee relationship existed between petitioner and its truck drivers. That such relationship did exist is not disputed of record and neither is it decided by the court below not to have existed. The trial court found that such relationship did exist (R. 219 et seq.). Such being the case, we respectfully urge, as a fundamental issue in the case at bar, that petitioner's truck drivers could not at one and the same time be employees of petitioner as a private carrier and, in the performance of the same transportation, be contract carriers within the meaning of the Arkansas Motor Carrier Act.

The decision of the majority of the Supreme Court of Arkansas is based upon a refusal to consider (1) whether petitioner was a bona fide private carrier; (2) whether a bona fide employer-employee relationship existed between petitioner and its truck drivers; (3) and the extent to which petitioner exercised exclusive direction and control over the transportation being performed. Such decision results, as well, from a refusal to apply legal principles enunciated by this court and the Interstate Commerce Commission to determine the status of interstate motor carrier transportation, and the erroneous application of United States District Court decisions thereto.

The action of the representatives of the Arkansas Public Service Commission^o resulted from enunciation by such commission of a "Conference Ruling and Order" appearing at pages 199-200 of the record and attempted enforcement thereof. This "Conference Ruling and Order" of the Arkansas Commission clearly tracks the opinion of the United States District Court in **Interstate Commerce Commission v. F. and F. Truck Leasing Corporation et al.**, 78 F. Supp. 13. Without conceding validity of the conference ruling and order it should be pointed out that at pages 87 et seq. of the record and pages 38 et seq. thereof, by witnesses for both petitioner and respondents, it is established without contradiction that no violation thereof is present in the case at bar, and that even under the provisions of same no transportation subject to the provisions of the Arkansas Motor Carrier Act has been performed.

*We shall not, unless forced so to do by the reply brief of respondents, endeavor to point out wherein the lower court decisions relied upon by the Supreme Court of Arkansas in its opinion are easily distinguishable from the issues involved in the case at bar. Suffice it to say, in the cases relied upon by the Supreme Court of Arkansas, the "responsibility and control" test was wholly ignored and the "ownership" test was applied as the paramount consideration in determining whether private or contract carrier was being performed.

The majority opinion of the Supreme Court of Arkansas, without any foundation whatsoever in the record, as is observed by the minority opinion (R. 232 et seq.) is predicated on a conclusion that the equipment leases between Whittington and petitioner are not bona fide leases, because the duration thereof does not exactly coincide with the duration of leases between Whittington and owners of motor vehicle equipment. The opinion overlooks the fact that the lease between Whittington and petitioner is itself

for a term of three years, but that it also provides for a change or substitution of equipment covered thereby from time to time by agreement of the parties, as well as the fact that in actual operation the equipment has been changed from time to time (R. 7-14, 43, 71).

The opinion of the court below further overlooks the undisputed fact that petitioner had no connection whatsoever with the arrangement between Whittington and the persons from whom he might have leased equipment, and had no knowledge thereof or control thereover, and that Whittington had no connection with the employment of drivers by Fry nor any control over their operations.

It is to be particularly noted that the opinion of the majority of the court below does not find that the equipment lease agreements involved were not scrupulously complied with in actual operation.

The only response to the conclusion of the opinion of the majority of the court below that petitioner's transportation system was adopted as a "subterfuge" that can be made is that which is found in the minority opinion, i. e., **there is simply no iota of evidence in the record to support such conclusion.** The opinion of the majority below is predicated upon three erroneous premises: (1) That the definition of "contract carrier" contained in the Arkansas Motor Carrier Act is or was intended to be "all inclusive"; (2) that petitioner is seeking to enjoy the benefits of some privilege which the Arkansas Public Service Commission might grant; and (3) that petitioner is seeking to avoid some supervision which the Arkansas Public Service Commission might lawfully exercise.

If petitioner is, in truth and in fact, a private carrier, if its truck drivers are its employees and a true employer-employee relationship exists between petitioner and its

truck drivers, and if the transportation being performed is interstate transportation, then, by indirection the Arkansas Public Service Commission is attempting to do that which it cannot do by direction, preventing the performance of private interstate motor carriage in Arkansas by petitioner by the utilization of equipment and employees of its own choosing; thereby freedom of contract and of action is being impaired, interstate commerce is being unduly hampered, burdened and destroyed, and petitioner is being deprived of its property without due process of law, while a state regulatory body invades a field of interstate transportation pre-empted by Congress.

**The End Sought by the Arkansas Commission
Is Impossible of Attainment.**

Petitioner's employees have been arrested and are being prosecuted for failing to have contract carrier permits issued by the Arkansas Public Service Commission under the provisions of the Arkansas Motor Carrier Act. (Appendix C.)

Petitioner herein takes the position that, under the undisputed facts of record, the only contract carrier permit which the Arkansas Public Service Commission could grant to petitioner's employees would be for the performance of intrastate transportation, whereas the only transportation involved in this proceeding is interstate transportation. This position is predicated upon the rules and regulations of the state regulatory body promulgated by it under duly vested authority. Pertinent portions of such rules and regulations are attached hereto as Appendix D.

It is to be noted that as a prerequisite to the granting of an interstate permit the carrier must file a copy of the operating authority granted to it by the Interstate Com-

merce Commission. Petitioner's truck drivers have no contract carrier authority from the Interstate Commerce Commission, inasmuch as under the rulings of such Commission petitioner is a private carrier and its drivers are its bona fide employees.

Further, other prerequisites of the Arkansas Public Service Commission for the obtaining of an interstate contract carrier's permit cannot be met by petitioner's drivers. There is no contract between petitioner and its drivers for the transportation of any specific commodity over any given route or between any specified point. Petitioner's drivers simply transport petitioner's products in quantities designated by petitioner over any route designated by petitioner and to any point designated by petitioner. Neither can petitioner's drivers satisfy the prerequisite of the Arkansas Public Service Commission that a description of the equipment to be used be furnished inasmuch as petitioner alone designates the equipment to be used, and the financial status of petitioner's drivers is immaterial to petitioner inasmuch as it assumes complete responsibility for the safety of the cargo and operation of the leased motor vehicle equipment.

The practical effect of the decision of the Arkansas Supreme Court is to sanction criminal prosecution of petitioner's employees for failure to satisfy the foregoing requirements of the Arkansas Public Service Commission which, under the undisputed facts in this case, have no application to the transportation involved, and any permit which petitioner's drivers might obtain from the Arkansas commission would be for the performance of intrastate transportation, none of which has been or will be performed.

CONCLUSION.

It is respectfully submitted, therefore, that the judgment of the Supreme Court of Arkansas should be reversed and the decree of the Chancery Court for Pulaski County, Arkansas, should be affirmed.

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Fry Roofing Company,
Petitioner.

APPENDIX "A."

Part II, Interstate Commerce Act, Title 49, U. S. Code, Sections 301 et seq.:

"Section 303. (a) As used in this part— . . . (15)
the term 'contract carrier by motor vehicle' means
any person which, under individual contracts or agree-
ments, engages in the transportation (other than trans-
portation referred to in paragraph (14) and the ex-
ception therein [common carrier transportation] by
motor vehicle of passengers or property, in interstate
or foreign commerce for compensation."

"Section 303. (a) As used in this part— . . . (17)
the term 'private carrier of property by motor vehicle'
means any person not included in the terms 'common
carrier by motor vehicle' or 'contract carrier by mo-
tor vehicle', who or which transports in interstate
or foreign commerce by motor vehicle property of
which such person is the owner, lessee, or bailee, when
such transportation is for the purpose of sale, lease,
rent, or bailment, or in furtherance of any commercial
enterprise."

"Section 304. (a) It shall be the duty of the Com-
mission— . . . (2) to regulate contract carriers by
motor vehicle as provided in this part, and to that end
the Commission may establish reasonable require-
ments with respect to uniform systems of accounts;
records and reports, preservation of records, quali-
fications and maximum hours of service of employees,
and safety of operations and equipment."

"(3) To establish for private carriers of property
by motor vehicle, if need therefor is found, reason-
able requirements to promote safety of operations,
and to that end prescribe qualifications and maximum
hours of service of employees, and standards of
equipment . . ."

APPENDIX "B."

National Transportation Policy Enunciated by Congress
(54 Stat. L. 899 U. S. Code, Title 49, Notes Preceding Sections 1, 301, 901 and 1001):

"It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each. . . ."

APPENDIX "C."

Act 367 of the Acts of Arkansas, 1941, Arkansas Motor Carrier Act:

"Section 3. The provisions of this Act, except as hereinafter specifically limited, shall apply to the transportation of passengers or property by motor carriers over public highways of this state, and, to the procurement of, and provision of, facilities for such transportation; and the regulation of such transportation, and the procurement thereof and the provision of facilities therefor, is hereby vested in the Arkansas Corporation Commission.¹

"Section 4. Nothing herein shall be construed to interfere with the exercise by agencies of the Government of the United States [sic.] or its power of regulation of interstate commerce.

"Section 5. (a) As used in this Act—

"(7) the term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or indirectly, or by a lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public by motor vehicle for compensation whether over regular or irregular routes.

"8. The term 'contract carrier by motor vehicle' means any person, not a common carrier included under paragraph 7, Section 5 (a) of this Act who or which, under individual contracts or agreements and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement,

¹ Under Act 40 of the Acts of Arkansas, 1945, the powers previously vested in the Arkansas Corporation Commission were transferred to the Arkansas Public Service Commission.

transports passengers or property by motor vehicle for compensation.

“Section 5. (b) Nothing in this Act shall be construed to include . . . (3) any private carrier of property.

“Section 6. (a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this Act . . . (2) to regulate contract carriers by motor vehicle as prescribed by this Act . . .

“Section 11. (a) No person shall engage in the business of a contract carrier by motor vehicles over any public highway in this state unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business . . . ”

“Section 22. (a) Any person knowingly and willfully violating any provision of this Act . . . shall, upon conviction thereof, be fined not more than \$100.00 for the first offense and not more than \$500.00 for any subsequent offense . . . ”

“Section 25. The terms and provisions of this Act shall be construed to apply to interstate or foreign commerce only insofar as such application may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.”

APPENDIX "D."

Pertinent excerpts from "Rules and Regulations Governing Motor Carriers" promulgated by the Arkansas Corporation Commission, whose functions and duties and enforcement of such rules and regulations were assumed by the Arkansas Public Service Commission pursuant to Act 40 of the Acts of Arkansas of 1945, are as follows:

Instructions for Filing Applications.

"1. Formal application must be filed with the Arkansas Corporation Commission upon forms furnished by the Commission. Said application must contain the petitioner's name, place of business and post office address; a detailed description of the route over which the applicant desires to operate, a description of the equipment to be used, a full and complete financial statement, giving assets and liabilities, accompanied by a map showing the routes of the proposed operation.

"(a) If the proposed operation is freight service, the application must state the commodities to be transported, whether special or general, and whether the carrier is common or contract.

"(b) If applicant is a contract carrier an executed copy of the contract must accompany the application. All contracts must be approved by the Commission."

Interstate.

"5. For an **Interstate** permit you must also file application, accompanied by a \$25.00 filing fee. Also send a copy of your authority granted by the Interstate Commerce Commission. It will not be necessary for you to appear in person as the Commission does not require a formal hearing on interstate applications, but you must file your public liability, property damage, and cargo insurance with the Arkansas endorsement attached, countersigned by an Arkansas agent."

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members
of and Composing the ARKANSAS PUBLIC
SERVICE COMMISSION,
Respondents.

REBUTTAL BRIEF

Filed on Behalf of Petitioner.

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SUPREME COURT OF THE UNITED STATES.

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SERVICE COMMISSION,
Respondents.

REBUTTAL BRIEF

Filed on Behalf of Petitioner.

Until shortly before this case was called for presentation of oral argument on November 10, 1952, neither petitioner nor its counsel had been advised that a reply brief had been filed on behalf of respondents. As of this date neither petitioner nor its counsel have been served with copy of such brief, but counsel for petitioner procured a copy thereof from the office of the clerk, and, in the course of oral argument, the court graciously granted our request for time within which to respond thereto.

We pray the indulgence of the court in being permitted to submit a requisite number of mimeographed copies of rebuttal brief on behalf of petitioner, copies thereof having been served upon counsel for respondents, and a copy forwarded to the printer with directions that forty printed copies be promptly forwarded to the clerk of this court.

In response to the reply brief filed on behalf of respondents, it is to be noted that the sole theme and basis thereof is the same as that adopted by the majority opinion of the court below, i. e., that petitioner is engaging in some sort of a "subterfuge" with the purpose of avoiding compliance with some state statute which respondents might lawfully enforce.

As we analyze the decision of the court below and the reply brief filed on behalf of respondents, it appears that the fundamental bases thereof are that (1) the definition of "contract carrier" contained in Section 5 (a) (8) of the Arkansas Motor Carrier Act is or was intended to be "all inclusive"; (2) that petitioner is seeking to enjoy the benefits of some privilege which the Arkansas Public Service Commission might grant, and (3) that petitioner is seeking to avoid some supervision which the Arkansas Public Service Commission might lawfully exercise. It is petitioner's position that all three premises are erroneous.

Let us say at this point, however, that if petitioner is to be damned at the portals by the unsupported conclusion of the majority opinion below that its system of selling and distributing its merchandise is a "subterfuge," unlawfully designed to avoid regulation by the authorities of the State of Arkansas, without this court inquiring into the evidence of record supporting or failing to support such conclusion, and without this court, as did the court below, refusing to determine whether petitioner was, in truth and in fact, a bona fide private carrier within the meaning of Part II of the Interstate Commerce Act, and

without this court determining whether the primary business of petitioner was the sale and distribution of its products in interstate commerce rather than the performance of a transportation service, and without this court determining whether petitioner did in reality exercise exclusive direction and control over leased motor vehicle equipment and the drivers thereof, and without this court determining whether a bona fide employer-employee relationship existed between petitioner and his truck drivers, irrespective of whether they did or did not own tractors which were incorporated into the fleet of motor vehicle equipment leased and operated by petitioner, decision of all of which fundamental issues was pretermitted by the court below, then, in that event, our time and that of the court is being wasted and the substance of our client expended unnecessarily.

If, on the other hand, we are not to be precluded from having fundamental issues considered by this court simply because the draftsman of the opinion below, without support in the record, and in the face of dissenting opinions by his brethren, sought, ineffectually we are confident, to preclude review of the erroneous opinion below by the well-known device of characterizing petitioner's operation as a "subterfuge," then there is merit in our cause and the fundamental issues deserve consideration by this court.

The confusion in the court below, as well as of respondents and their counsel, is amply demonstrated by the statement made at page 6 in the "Brief Filed on Behalf of Respondents," where it is stated:

"The position of respondents in this matter is simply that they consider the arrangement devised by petitioners to be a device, ingenious though it may be, created for the sole purpose of allowing petitioner to gain the advantage of **private carriage** (sic) of commodities without assuming the burdens and hazards of that type of carriage. . . ." (Emphasis supplied.)

It is and always ~~has~~ been the position of petitioner that **it is a private carrier**; further, that Act 367 of the Acts of Arkansas, 1941, popularly known as the Arkansas Motor Carrier Act, by Section 5 (b) thereof provides that **"Nothing in this act shall be construed to include . . . (3) any private carrier of property"** (Appendix C to petitioner's brief, page 50). (Emphasis supplied.)

At the sake of repetition, and in response to the broad and general statements contained in the brief filed on behalf of respondents, wherein no record reference is made to support same, we reiterate our position that if petitioner is a private carrier within the meaning of the Interstate Commerce Act then its truck driver employees cannot, at one and the same time, in the performance of the same transportation, be contract carriers within the meaning of the Arkansas Motor Carrier Act; and we say, as well, that if a bona fide employer-employee relationship exists between petitioner and its truck drivers that in the performance of the same transportation they cannot be contract carriers within the meaning of the Arkansas Motor Carrier Act and, as well, the employees of petitioner; we say, further, without fear of any contradiction in the record, that the existence of a bona fide employer-employee relationship between petitioner and its truck drivers is, in the vernacular, established to be as "clean as a hound's tooth" and we challenge all comers to point out any finding of the court below to the contrary. We challenge all comers, as well, to point out any finding by the court below contrary to our assertion that petitioner exercised exclusive direction and control over motor vehicle equipment leased to it, regardless of by whom owned, over the drivers thereof, and that petitioner solely and alone directed when, where and by whom such equipment was to be operated, the cargo to be transported thereon, and all conditions surrounding the operation of such equipment and its utilization by petitioner as a private carrier

in the transportation of its merchandise. We challenge all comers, as well, to point out any finding by the court below or any evidence of record even remotely indicating any fact contradicting our assurance to this court that the record, without contradiction, establishes conclusively that petitioner assumed full responsibility to the public and all regulatory authorities for the operation of equipment leased to it and utilized by it in the distribution of its merchandise.

We respectfully present to the court that the brief filed on behalf of respondents, as was the opinion of the majority below, is predicated on district court decisions which are neither in point on the facts nor legal principles involved in the case at bar and which, insofar as applicable, support the contentions of the petitioner in this cause. In this connection it is significant, however, that even astute counsel for respondents in their brief filed in this court recognize that a number of the cases referred to by the court below have no applicability, and that they have not relied thereon in the brief filed with this court.

Let us first allude to the opinion in **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13, upon which great reliance is placed by respondents and the majority opinion below. It is to be noted, in contradistinction to the undisputed facts of record in this case, that the leases there involved were for single trips; lessor provided the drivers and lessee did not select or designate the drivers of the particular equipment supplied to them; frequently, at the end of the outbound haul, lessor would lease the equipment to another shipper and direct the driver in performance of the transportation; frequently equipment rental charges were based on rates and cents per 100 pounds of property hauled; drivers' wages were deducted by lessee from the agreed equipment rental; lessor carried cargo insurance on the property transported; bills of lading were frequently issued by

lessor to lessee for cargo transported; lessor directed the drivers when and where to report for duty; drivers' logs were delivered to lessor; provisions of the written leases relating to the selection of drivers and exclusive control of the operation were not observed by lessee.

We shall not burden the court with a repetition of the summary of the evidence contained in our brief wherein it was pointed out, in detail, that the actual operation under the equipment leases involved in this litigation was in scrupulous compliance with the terms and provisions of such leases (which fact was not alluded to by the majority opinion of the court below), and wherein, as well, it was pointed out that **not one** of the objectionable features found by the court to exist in the arrangement under consideration in **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13, was present in the case at bar.

As we pointed out in our original brief, the action of respondents herein was predicated on the conclusion that petitioner's operations violated a "Conference Ruling and Order" promulgated by the Arkansas Public Service Commission in Case No. R-461 (R. 199 et seq.), which Conference Ruling and Order tracks, in all respects, the decision of the District Court in **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13. Further, as we pointed out in our initial brief, all evidence of record definitely established that **not one single feature** found objectionable by either the Arkansas Public Service Commission or the United States District Court in the case of **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13, exists in the case at bar. See, for example, the testimony of the witness Whittington, introduced by respondents, appearing at pages 38 et seq. of the record, and the testimony of the witness Hecht, introduced by petitioner, appearing at pages 87 et seq. of the record.

Each of these witnesses was asked specifically with respect to every element considered by the court in the **F. & F.** case and the Arkansas Public Service Commission to be determinative of whether contract or private carriage was being performed, and, without contradiction, each of the witnesses for both petitioner and the respondents, establish that all elements considered essential to the performance of private carriage as distinguished from contract carriage existed in this case.

Obviously, the factual situation with which the court was confronted in the **F. & F. Truck Leasing Company**, supra, is distinguishable from that in the case at bar, but the attention of this court is directed to the significance attached by the court in the **F. & F.** case to the failure of lessee to conform to the terms and provisions of the written lease and to exercise direction and control over the drivers and equipment and to assume responsibility for operation thereof on the highways. This distinction was entirely overlooked by the majority opinion of the court below.

The next case strongly relied on by respondents and by the court below is that of **United States of America v. LaTuff Transfer Service, Inc., et al.**, 95 F. Supp. 375, wherein we again say the factual situation varies greatly from that obtaining in the case before this court as is amply demonstrated by the preliminary remarks of the court in such case, as follows:

"It was agreed that the primary issue to be determined in this case is whether the operator of a truck rental business may lawfully, without a certificate or permit from the Interstate Commerce Commission, furnishes motor vehicles for compensation to a shipper for a one-way outbound haul for delivery of the shipper's property moving in interstate commerce, where the driver is an employee of the owner-operator and is

jointly selected by the operator and the shipper to serve as an employee of the shipper in driving the vehicle to the end of the outbound trip. Upon reaching the destination of the outbound trip the driver takes over the vehicle and serves as agent of, and driver for, the owner-operator for further leasing of the equipment by the operator to an authorized motor carrier in transporting general commodities in interstate commerce for compensation, as well as transporting unprocessed agricultural commodities for shippers on the return to the original point."

The court, in the **LaTuff Transfer Service Case**, *supra*, attaches great significance to the fact that the driver was not a bona fide employee of the shipper; that the lessor assumes responsibility for safe transportation of the cargo, and that lessee exercised no control over the equipment or the drivers on the inbound haul and assumed no responsibility for the return movement of the equipment, either financially or otherwise. No such factual situation is presented in the case at bar, or was found to exist by the opinion of the majority of the court below.

Further, in **Georgia Truck System, Inc., v. Interstate Commerce Commission**, 123 F. (2d) 210, relied upon by respondents in brief and by the majority opinion of the court below; the court had under consideration an operation which was set up for the specific purpose of performing transportation, a portion of which had previously been performed under a contract carrier permit; there the court found as a fact that the actual operation did not conform to the terms of equipment leases involved. Further, the lessor selected and furnished the drivers and paid their wages and lessee exercised no control whatsoever over the drivers. In addition, the lessor of the equipment assumed responsibility for cargo transported and carried insurance thereon. Evidence of subterfuge existed in kick-backs of

drivers' wages and social security taxes allegedly paid by lessee.

We respectfully present that the factual situation involved in such case is far removed from that existing in the case at bar.

The attention of the court is challenged, however, to the indication in all of the above cases that had actual operations been in compliance with the terms and provisions of the equipment leases the operations would have been held to be bona fide private carriage. In the case at bar the opinion below does not find that in actual operation the provisions of the equipment leases were not scrupulously complied with in any respect.

Petitioner has no quarrel with the principle that, within permissible limits, states may impose regulations on interstate commerce where such do not unduly burden, hinder, or destroy such commerce, but the cases cited by respondents in brief are not in point in this proceeding. It must be remembered that the transportation here involved is private carriage within the meaning of the Interstate Commerce Act, and that the Arkansas Motor Carrier Act specifically provides that the provisions thereof **shall not apply to private carriage**. To refer to the cited cases, in **Columbia Terminals Company v. Lambert et al.**, 309 U. S. 620, 84 L. Ed. 983, plaintiff admittedly was a contract carrier; **South Carolina State Highway Department v. Barnwell Bros., Inc., et al.**, 303 U. S. 177, 82 L. Ed. 734, establishes simply the right of states to enact height and weight limitations for vehicles engaged in using the highways of the state where no such limitations have been prescribed by Congress; and in **Frank Eicholz v. Public Service Commission of the State of Missouri**, 306 U. S. 268, 83 L. Ed. 641, the court simply held that the state had a right to revoke an interstate common carrier's certificate granted by it to the carrier by virtue of the fact that the carrier had vio-

lated an intrastate permit, the carrier having applied for but not yet obtained an interstate common carrier's certificate of convenience and necessity from the Interstate Commerce Commission. Thus, it is plain that neither of the foregoing decisions have any application to the issues and principles involved in the case at bar.

The decision in **Bradley v. Public Utilities Commission**, 289 U. S. 92, 77 L. Ed. 1053, was handed down on April 10, 1933, prior to enactment of Part II of the Interstate Commerce Act. In such case, the sole question before the court was the validity of an order of a state regulatory body denying an application for a common carrier permit upon the grounds that safety on the highways and of the public would be imperiled by the proposed operation, i. e., the question being the lawful exercise by the state of its police power. The decision is predicated solely and alone upon the principle, with which we have no quarrel, that in the exercise of its police power the state may promulgate and enforce reasonable regulations to insure safety on its highways. This question is not involved in the litigation at bar.

And finally, to dispose of all cases cited by respondents in brief, in **Latta Truck Lines, Inc., v. Hargus et al.**, 29 F. Supp. 53, plaintiff admittedly was a contract carrier, having applications to operate as such pending before both the Interstate Commerce Commission and the state regulatory body. The sole question before the court was whether a temporary injunction staying action of the state body would be granted pending final action of the Interstate Commerce Commission.

The opinion does not dispose of the controversy nor of any essential element thereof on the merits, and no issue present in the case at bar was presented in such case; the opinion in this case was handed down by the district court on June 15, 1937, and it is significant that it has not been cited by any court since it was rendered.

By the foregoing we have endeavored, and, effectually we believe, to point out wherein the opinion of the majority below as well as of the brief filed by respondents in an effort to support such opinion, is predicated upon conclusions having no factual basis in the record and the citation of portions, removed from context, of opinions of lower federal courts and of this court, wherein neither the factual situations comparable to those in the case at bar nor the legal principles at issue were involved.

Proper determination of the issues in the case at bar resolves itself, we respectfully submit, into the following propositions: (1) Is mere ownership of motor vehicle equipment to be determinative of the question of whether, under Part II of the Interstate Commerce Act, private or contract carriage is being performed, without consideration of the primary business of the shipper, without consideration of the extent to which direction and control is exercised over the equipment and the driver thereof, and without consideration as to whether or not a bona fide employer-employee relationship exists between the truck driver and the shipper transporting its own merchandise in interstate commerce? If the answer is in the affirmative, then the decree of the court below should be sustained. If, on the other hand, the foregoing elements are of any importance and deserving of any consideration in determining whether in the transportation of goods in interstate commerce contract or private carriage is being performed then the answer necessarily must be in the negative and the judgment of the court below reversed.

(2) If it is to be held that a bona fide private carrier of property cannot transport its goods in interstate commerce by the utilization of leased equipment and the employment of a driver therefor as a bona fide employee irrespective of whether he does or does not own the leased equipment then, in that event, the judgment of the court below should be affirmed; on the other hand, if a private

carrier may transport its property by the use of leased motor vehicle equipment, and enter into bona fide employer-employee relations with any person to drive such equipment, regardless of the ownership thereof, then, in that event the judgment of the court below must be reversed.

(3) If the law of the land is to be that the mere ownership of equipment, rather than direction and control over such equipment as well as the driver thereof and the responsibility of the shipper to the public at large is to be determinative of the question of whether private or contract carriage is being performed, within the meaning of the Interstate Commerce Act, then the judgment of the court below should be affirmed; if, on the other hand, the "primary business" test and the "direction and control" test and the test whether or not in actual operation the provisions of written equipment leases are complied with are entitled to any consideration then, in that event, the judgment of the court below should be reversed.

(4) If it is to be held to be the law of the land that a shipper, whose status as a private carrier is unquestioned, may have a truck driver employee employed in a bona fide employee status, which status is also unquestioned, and that in the performance of the same transportation the shipper shall be held to be a private carrier within the meaning of the Interstate Commerce Act and the truck driver employee a contract carrier within the meaning of the Arkansas Motor Carrier Act, then, in that event, the judgment of the court below should be affirmed; if this anomalous situation cannot be countenanced, then the judgment of the court below should be reversed.

(5) If it is to be held that a truck driver, employed by petitioner, transporting petitioner's merchandise under exactly the same terms and conditions of employment, under the same supervision and regulation, who today is oper-

ating a tractor not owned by him is a bona fide employee of petitioner as a private carrier, but who, tomorrow, happens to operate a tractor owned by him incorporated in a fleet of equipment leased to petitioner, thereby automatically becomes a contract carrier within the meaning of the Arkansas Motor Act, although he has no discretion as to the equipment which will be operated by him, the kind, character or quantity of merchandise to be transported thereon, the destination thereof, the route over which he will operate, the time of performance of the transportation, and whose compensation is based solely and alone upon the number of miles driven as distinguished from cargo handled, then, in that event, this court should say that the judgment below should be affirmed, and that today this truck driver is a contract carrier and tomorrow this truck driver is an employee of petitioner herein. If, on the other hand, our conception of the law is correct and if we have correctly represented the facts of record to the court, then, in that event, the judgment of the court below perforce must be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 724. 37

LLOYD A. FRY ROOFING COMPANY *Petitioner*

vs.

SCOTT WOOD ET AL. AS ARKANSAS PUBLIC
SERVICE COMMISSION *Respondents*

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS**

EUGENE R. WARREN

Counsel for Respondents

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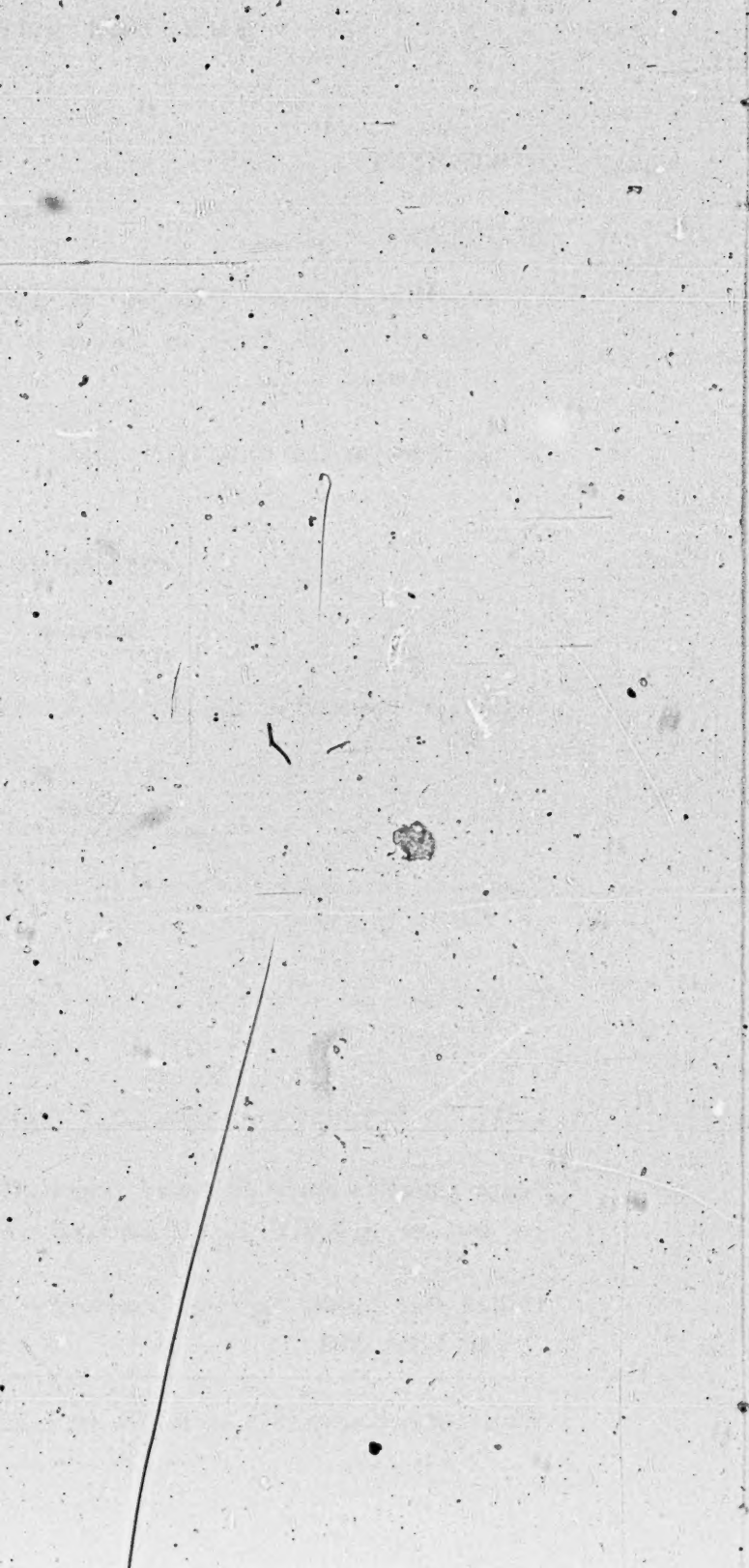
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. _____

LLOYD A. FRY ROOFING COMPANY _____ *Petitioner*

vs.

SCOTT WOOD ET AL. AS ARKANSAS PUBLIC
SERVICE COMMISSION _____ *Respondents*

STATEMENT

The petitioner, Lloyd A. Fry Roofing Company, which for brevity we will hereinafter refer to as Fry, seeks a writ of certiorari from this Court to the Supreme Court of Arkansas, asserting that the Supreme Court of Arkansas, in finding successive lease arrangements between Fry, one Whittington and certain driver-owners a mere subterfuge to evade the transportation laws of Arkansas, and in requiring the driver-owners using the highways of Arkansas to obtain permits as contract carriers, has imposed a burden upon interstate commerce and has infringed upon its constitutional rights.

In an attempt to gain the advantage of private carriage of commodities without the accompanying burdens or hazards, Fry adopted a very ingenious device of lease arrangement with certain owners of vehicles through a third person, Whittington, the final sum and effect of

which was to allow Fry to ship its goods over the highways of Arkansas in vehicles operated by the owners thereof, who had not obtained permits from the State of Arkansas as contract carriers. Payment, according to the ultimate effect of the leases, was based upon a mileage rate. Asserting that the driver-owners were, in fact, contract carriers under the definition of Section 5 of Act 367 of the Acts of Arkansas of 1941, commonly called the Arkansas Motor Carrier Act, the enforcement officials of the Arkansas Public Service Commission arrested and filed charges against certain of the driver-owners for violations of the Arkansas Motor Carrier Act. No charges were ever made against Fry, which interposed itself between the state and the driver-owners by injunctive action against the Public Service Commission to prohibit its enforcement officers from disturbing or arresting the driver-owners on the theory that they were Fry's employees and immune from the provisions of the Arkansas Motor Carrier Act.

The decision of the Supreme Court of Arkansas was rendered after a full consideration of evidence contained in a large record, and is based upon a finding from that consideration of the evidence that the lease agreements were but devices to evade the provisions of the Arkansas Motor Carrier Act. This is apparent from the language of the opinion (Rec. 225). The effect of the decision of the Arkansas Supreme Court is to require that persons, who it found from factual considerations were in fact contract carriers as defined by the statutes of Arkansas, obtain permits for contract carriage in accordance with the statute. That such determination of fact possibly might prevent petitioner from enjoying a peculiar financial advantage, or advantageous immunity in the use of the highways of the State of Arkansas, hardly could be said to raise a substantial federal question.

ARGUMENT

Contract Carriers Engaged in Interstate Commerce Validly May be Required to Obtain a Permit from the State of Arkansas

The respondents submit that the petition for writ of certiorari should be denied for the primary reason that this Court has many times held that the requirement by a state that interstate carriers obtain a permit to use the highways of the state is not an undue burden upon interstate commerce. It is significant that neither petitioner nor the driver-owners have applied for or received a permit or certificate from the Interstate Commerce Commission. Attention is respectfully directed to the letter of the representative of the Interstate Commerce Commission to Fry (Rec. 162) and Fry's response thereto (Rec. 163). No application has been made for permit from the State Public Service Commission. Petition should, therefore, be denied. *Columbia Terminals Company v. Lambert, et al.*, 84 L.Ed. 983, 309 U.S. 620; *Frank Eicholz v. Public Service Commission of the State of Missouri*, 306 U. S. 268, 83 L.Ed. 641; *South Carolina State Highway Department v. Barnwell Brothers, Inc., et al.*, 303 U. S. 177, 82 L.Ed. 734; *Latta Truck Lines v. Hargus*, 29 F. Supp. 53.

No Federal Question Is Involved

Since this Court has held consistently that a state, in the absence of discrimination, may require persons using its highways for profit and gain to obtain a permit for such use even though interstate commerce is incidentally affected, the only question remaining is whether or not the driver-owners were contract carriers under the definition set out in the Arkansas Motor Carrier Act. This

involves an interpretation of facts under a state law. Such an interpretation made by the highest Court of the state will not be disturbed by this Court. *Williams v. Kaiser*, 323 U. S. 471, 89 L.Ed. 398; *United Gas Public Service Company v. Texas*, 303 U. S. 123, 82 L.Ed. 702.

CONCLUSION

The Petition should be denied.

EUGENE R. WARREN

Counsel for Respondents

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37

SUPREME COURT OF THE UNITED STATES

LLOYD A. FRY ROOFING COMPANY *Petitioner*

v.

No. 37, October Term, 1952

SCOTT WOOD, ET AL, individually and as
members of and composing the
ARKANSAS PUBLIC SERVICE COMMISSION *Respondents*

BRIEF FILED ON BEHALF OF RESPONDENTS

C. HOWARD GLADDEN AND

JOHN R. THOMPSON

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No. 37, October Term, 1952

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STATEMENT

In the fall of 1949 Fry Roofing Company, petitioner, adopted a plan for the transportation of its products which involved a successive leasing arrangement between certain individual owners of vehicles to a man named Whittington, who in turn leased the vehicles to Fry Roofing Company, which company then employed the owner of the vehicle as its driver. Payment for truck and driver was based upon a mileage rate. Neither petitioner, the driver-owner, nor Whittington held or applied for a permit to operate motor vehicles as a carrier of goods over the highways of the State of Arkansas (R.32). The respondent, the Arkansas Public Service Commission, acting in its official capacity as an agency of the State of Arkansas, and in compliance with the duties imposed upon it by Section 6 of the Arkansas Motor Carrier Act, Act 367 of the Acts of Arkansas, 1941, began an investigation of the method of operation being used for the transportation of petitioner's products. Enforcement officials of the department stopped several trucks being operated by the driver-owners under the lease agreements and attempted to ascertain from them the details of this method of operation. They determined that the driver claimed

to be the owner of the truck and also an employee of petitioner. They were unable to obtain a copy of the lease between the driver-owner and Whittington although each driver had a copy of the lease between Whittington and Fry (R.143). The respondent, after giving the matter study and in accordance with the conference ruling in case No. R-461 entered May 11, 1949 (R.199), concluded that the successive lease arrangement was a mere subterfuge to evade proper compliance with the provisions of the Arkansas Motor Carrier Act. It directed its enforcement officers to arrest several of the driver-owners for failure to comply with the Arkansas Motor Carrier Act so that the matter could be tested. Several arrests were made in accordance with these instructions. On January 26, 1950, a conference was held between the general traffic manager of the petitioner, two enforcement officers of the Arkansas Public Service Commission, a representative of Whittington, and the district director of the Interstate Commerce Commission (R.144). This conference was held at the offices of the Public Service Commission and with the members thereof. At this conference it was revealed that petitioner was introducing this plan in all of its plants in various parts of the United States (R.159). It was there agreed that Whittington would restrict his transportation for Fry in the State of Arkansas to vehicles that were then owned by Whittington until the validity of petitioner's plan of operation could be passed upon by the courts (R.180). (Subsequent events proved that this agreement was violated by Whittington who later refused to enter openly into the State of Arkansas except upon a promise of immunity from the law enforcement officials of the State, with the possible exception of one conference in West Memphis at which he promised to return to West Memphis, Arkansas, the following day if he were not arrested and which promise

he also violated.) In the conference of January 26th the respondents were given a copy of the lease agreement between the driver-owners of the trucks and Whittington and also a copy of the lease between Whittington and petitioner. This was the first time that respondents had been successful in obtaining copies of the leases. After investigation respondents concluded that the driver-owners were actually contract carriers under the definition of the Arkansas Motor Carrier Act, Sec. 5, and so informed the parties. Petitioner insisted upon continuing its method of operation notwithstanding. Thereafter arrests were made when violations of the law were found. The details of these arrests are contained in the record. Action was instituted by petitioner in the Chancery Court of Pulaski County to restrain and enjoin the respondents individually and as the Arkansas Public Service Commission, their servants, agents and employees, from arresting or molesting the driver-owners or employees of petitioner. This injunction was dissolved upon stipulation so as to allow arrests for violations of safety and local laws. Upon hearing the Chancery Court found that the driver-owners were employees of petitioner and that the entire arrangement constituted private carriage. Upon appeal the Supreme Court of Arkansas reversed the decision of the lower court finding that the driver-owners were contract carriers under the definitions as contained in Sec. 5(a)(8) and that the successive lease agreements were a subterfuge in order to evade compliance with the Arkansas Motor Carrier Act (R.225). Thereafter, certiorari was granted by this Honorable Court (R.224).

ARGUMENT

The Arkansas Supreme Court Correctly Held that the Driver-Owners Were in Fact Contract Carriers Under the Arkansas Statutes

The Arkansas Motor Carrier's Act, Act 367 of 1941 defines a contract carrier as follows:

"The term 'contract carrier by motor vehicle' means any person, not a common carrier included under Paragraph 7, Section 5(a) of this Act, who or which, under individual contracts or agreements, and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation." Arkansas Statutes, 1947, 73-1705(8).

It is necessary to read the two leases, that is, leases from the driver-owners to Whittington and the lease from Whittington to petitioner, together in order to ascertain the true intent of the parties and the reality of the transaction. Both leases must be examined in relation to each other so that the practical effect of the entire transaction can be discovered. Petitioner has asserted repeatedly that the trucks were in the "entire control" of petitioner. The very wording of the two leases, however, negatives that contention. We think it proper to call the attention of the Court at this time to the change in the lease agreement made by Whittington sometime after the conference between the parties on January 25, 1950. In the original lease (R.27), which was presented to respondents at the conference, there was a requirement that the lessor or driver owner, as we choose to describe him, must obtain and keep employment with petitioner. After the conference this form of lease was changed so as to eliminate this

particular paragraph. The new form of lease (R.34) does not contain a provision requiring employment of the lessor and it also changed the cancellation notice from five to thirty days. Respondents were not notified or informed of this change until the trial of this case in the lower court. In all other respects the leases between Whittington and the driver-owners seem to be identical.

In the lease between the driver-owner and Whittington, the driver-owner agrees (1) to equip and maintain the tractor and supply the same with fifth wheel, extra gas tank and all required service equipment, (2) maintain the truck and tractor in good and efficient working order, (3) to pay all costs of operation of the tractor including, but not limited to gasoline, oil, tires, replace parts and repairs and all necessary licenses, road mileage taxes and registration fees, (4) to paint the truck and tractor in the color and manner and with the insigna or names designated by Whittington, (5) to keep the truck and tractor washed, cleaned and polished during the term of the agreement, (6) to have in effect at all times fire, theft and collision insurance. Whittington agrees to pay as rental for the equipment as furnished by the driver-owner, the sum of 9c per mile for all miles operated.

In the Whittington-Fry Leasing Agreement, Whittington agrees to provide (1) garage service including washing, polishing, oiling, greasing, inspection and storage, (2) all licenses, (3) all maintenance and repairs, (4) all fuel oil etc., (5) painting and labeling, (6) tires and tubes, and extra tires, (7) insurance against fire, theft, tornado and wind storm. Fry agrees to pay Whittington the sum of 15½c per mile for the equipment. Fry employs the driver who is the original owner of the truck for the sum of 5c per mile. As found by the Arkansas Supreme Court the net result is that the owner of a truck

furnishes the truck and the driver with all the services to Fry to transport Fry's properties for the sum of 20½¢ per mile. Fry is receiving a completely furnished serviced and maintained truck with driver which it uses to transport its products for sale. It is difficult for respondent to perceive the distinction between this overall arrangement and other types of contract carriage. In all contract carriage, the shipper has the right to designate where the goods are to be taken and at what time. Consideration must also be given to the testimony of Whittington (R.32) that he was not leasing any trucks from individuals which were in turn leased to petitioner where the individual was not employed by petitioner as a driver. The position of the respondents in this matter is simply that they consider the arrangement devised by petitioners to be a device, ingenious though it may be, created for the sole purpose of allowing petitioner to gain the advantage of private carriage of commodities without assuming the burdens and hazards of that type of carriage; that petitioner by such arrangement is shipping its goods over the highways of Arkansas in vehicles operated by the owners thereof, which owners are actually contract carriers and who have not obtained permits from the State of Arkansas to operate as such contract carriers. Having reached this conclusion, the respondents must of necessity discharge the duties imposed upon them by the laws of Arkansas and the oath of their office by directing that those violating the law be arrested. This matter has been unusual in that the petitioner has, in the opinion of the Arkansas Public Service Commission, assiduously attempted to give to the officials of the State of Arkansas only that information which it wanted them to have. Its actions have been characterized by a complete indifference toward the rights of a sovereign state. The respondents have no desire and have had no desire to treat the petitioner in

any different manner than any other person or company which they conclude comes under their jurisdiction. The record will reflect that upon each occasion that an effort was made to test the legal position of the petitioner's plan, the petitioner's agents and employees failed to go forward in a test through appropriate channels. Respondents were faced with a situation wherein a company openly defied the authority of an arm of the State of Arkansas insisting upon pursuing its course of action notwithstanding it had been instructed not to do so until the legality of its plan had been submitted to the courts in an orderly democratic process. Having determined that petitioner's plan, as it was being operated, would constitute a violation of the Arkansas Statutes, the respondents were faced with the choice of either closing their eyes and allowing petitioner to continue its operations until the question had been decided by the courts, or demanding that petitioner cease its operation until the court had passed upon the question. Petitioner insisted that the A.P.S.C. bow to its asserted superior right to conduct its operation as it chose regardless of the official opinion of the A.P.S.C. It is small wonder when one reads the record in its entirety that the respondents looked upon petitioner's action with some suspicion.

The Supreme Court of Arkansas has found from a careful study of the evidence presented that the plan of petitioner was a mere device to avoid the statutes of Arkansas. The dissenting opinion is ample proof that the Court considered very carefully the factual questions presented and by a majority of five to two reached this decision. The Arkansas Supreme Court cited as authority for its finding the following cases:

Georgia Truck System v. Interstate Commerce Commission, 123 Fed. 2d 210;

Interstate Commerce Commission v. F. and F. Truck Leasing Co., 78 Fed. Supplement 13;

U. S. v. LaTuff Transfer Service, 95 Fed. Supplement 375.

Respondent respectfully submits that the decision of the Supreme Court of Arkansas, based upon conflicting evidence, should not be disturbed in the absence of clear and convincing error.

A State Does Not Burden Interstate Commerce by Requiring Contract Carriers to Obtain Permits to Use the Highways of the State

The record reflects quite clearly that there has been no application for permit for contract carriage by the driver-owners, nor has there been an application by Whittington for a permit to act as a broker. No question is involved in this case as to the reasonableness of any regulation or any requirement for a permit. The respondents do not contend that they have a discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce. Respondents have imposed no burdensome requirements or regulations upon any person applying for such permits, and the record is void of any such action by the Arkansas Public Service Commission. Any fears of burdensome requirements or regulations are without foundation. Respondents assert simply that one who uses the highways of the State of Arkansas for profit, whether he be in interstate or intrastate commerce, may validly be required to register with the appropriate agency of the State of Arkansas and to obey its police requirements and such rules and regulations as the welfare and safety of the people of Arkansas require, based always, however, upon a safeguard of the constitutional guaranties of not only the citizens of this

state, but the citizens of all states. This Court has many times held that such power rests with the state.

Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L.ed. 1053;

Columbia Terminals Co. v. Lamber, et al., 84 L.ed. 983, 309 U.S. 620;

Frank Eicholtz v. Public Service Commission of the State of Mo., 306 U.S. 268, 83 L.ed. 641;

South Carolina State Highway Department v. Barnwell Brothers, Inc., et al., 303 U.S. 177, 82 L.ed. 734;

Latta Truck Lines v. Hargus, 29 Fed. Supp. 53.

Respectfully submitted

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HAROLD B. WILSON, JR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members of and
Composing the ARKANSAS PUBLIC SERVICE
COMMISSION,
Respondents.

PETITION FOR REHEARING

Filed on Behalf of Petitioner.

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Respondents.

PETITION FOR REHEARING **Filed on Behalf of Petitioner.**

On the 8th day of December, 1952, the Court handed down its opinion in the above cause, at which time Mr. Justice Douglas, with whom the Chief Justice, Mr. Justice Burton, and Mr. Justice Minton joined, dissented. By order entered herein on the 16th day of December, 1952, the time for filing petition to rehear was extended to and including January 7, 1953.

Petitioner, Lloyd A. Fry Roofing Company, is much aggrieved at the action of the Court in affirming the judgment of the Supreme Court of Arkansas, and respectfully

petitions this Court to rehear, upon the following grounds, to-wit:

1. The opinion of the Court is not predicated upon determination of any basic issue presented by the pleadings or determined by the Court below.

2. The opinion of the Court ignores entirely the position assumed below by respondents in pleading and by respondents' officials testifying under oath as to the past and proposed application of the Arkansas Motor Carrier Act (Act 367, Arkansas Laws, 1941) in respect to the transportation of petitioner's goods in interstate commerce, and substitutes for the statutory language, the pleadings, the proof, and the position heretofore assumed in brief by respondents, a position with respect to discretionary powers of the Commission first assumed in a late-filed brief herein.

3. The state Commission cannot lawfully disclaim intention to comply with the positive mandates of the Act by which it was created.

4. The opinion erroneously elides the mandatory word "shall" from the state statute in question, and the holding of the Court is predicated upon an unjustified substitution of a discretionary "may" therefor.

5. The opinion of the Court erroneously fails to take cognizance of the fact that in stark reality petitioner's drivers are being arrested and criminally prosecuted, not for failing "to identify themselves as users of that state's highways," to quote the opinion herein, but for failing to hold "a permit or certificate of convenience and necessity from the Arkansas Public Service Commission" (**P. S. C. v. Fry**, 219 Ark. 553, 554).

6. The Court erred in treating the issue involved as being the right of the Arkansas Commission to regu-

late use of Arkansas highways; as distinguished from the right to regulate the business of engaging in interstate commerce.

7. The Court erred in impliedly adopting the position said to be assumed by respondents (and that for the first time in brief filed in this Court) that the sole objective of respondents is to require interstate carriers to identify themselves " . . . in order that it [the Commission] may properly apply the state's valid police, welfare, and safety regulations to motor carriers using its highways," and in considering that in any respect any issue is presented relative to the exercise by any state agency of any police power, welfare or safety regulation.

8. The Court erred in basing its holding on the conclusion that the operation in question is a "sham" when no consideration, apparently, has been given to the undisputed evidence of bona fide compliance, in actual operation, with all applicable criteria established by federal statutory or administrative pronouncements.

9. The Court erred in not holding that the State here is seeking, unlawfully, to regulate interstate commerce in a field preempted by Congress.

BRIEF AND ARGUMENT.

The questions presented by this petition for rehearing are, in many respects, essentially different from those heretofore urged, albeit the fundamental position heretofore assumed by petitioner remains unchanged. By the opinion herein issues have been injected and apparently considered as controlling which heretofore, insofar as petitioner was advised, had no place in the litigation.

In the light of a careful analysis of the opinion herein, the statute of the State of Arkansas involved, the opinion of the court below and principles previously enunciated by this Court we strongly feel that except for the concluding sentence of the opinion herein, such opinion would not have become the opinion of this Court. Such sentence is:

"At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways."
(Emphasis added.)

This very carefully worded holding of the Court is obviously predicated upon the two erroneous conclusions that (1) all that the Arkansas Commission is seeking to do, under authority of the statute involved, is to require motor carriers to "identify themselves", and (2) that the question presented is the right of the Commission to regulate use of Arkansas Highways, rather than the authority of the Arkansas Commission to require the holding of a permit or certificate of convenience and necessity as a prerequisite to **engaging in the business** of interstate transportation, and as distinguished from the simple making of application therefor. The opinion, in other words, and as will be discussed more fully hereafter, treats only of the question of regulation of use of state highways, rather

than regulation of the business of interstate motor carrier transportation, the true issue in the case.¹

It appears, as well, that the Court could not have more plainly stated that its holding was not to be construed as being determinative of any other question presented by the "Specification of Errors to be Urged" appearing at pages 16-17 of petitioner's brief herein. And, apparently, the holding herein is not intended to be considered as going so far as to approve the conclusion of the court below that the truck drivers are "contract carriers" within the meaning of the Arkansas Act.

Before further examining the holding herein in the light of the involved statute and the record in the case we pray leave of Court to point out that such holding appears to be predicated solely and alone upon findings in the opinion upon factual questions here **for the first time** presented in

1 It is significant that in *Buck v. Kuykendall*, 267 U. S. 307, where a state statute similar to one here involved was under consideration, the line between what constitutes regulation by a state of the use of its highways and regulation by a state of interstate commerce was clearly drawn. In this connection Mr. Justice Brandeis, at pages 315-6, said:

"The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. Thus the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct it. Such state action is forbidden by the Commerce Clause."

And, in this same connection in *Bush Company v. Maloy*, 267 U. S. 317, at page 324, Mr. Justice Brandeis said:

"The state action in the *Buck Case* was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation."

The decisions in the *Buck* and *Bush* cases were handed down before enactment of Part II of the Interstate Commerce Act, whereby the field of interstate motor carrier transportation was pre-empted by Congress.

the litigation, which findings are contra to the technical record in the case, as well as to the undisputed testimony of respondents' officials and the findings of the court below.

For example, in order to distinguish this case from the holding of the Court in **Buck v. Kuykendall**, 267 U. S. 307; the opinion herein, at page 4, states:

"It [the Arkansas Commission] has asked these driver-owners to do nothing except apply for a permit as contract carriers are required to do by the state Act."

Presumably this finding is that upon which the Court relies in saying, "At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways."

The foregoing basic finding, we repeat, is contrary to the technical record as well as the testimony of officials of the Arkansas Commission. The uncontradicted record is that petitioner's drivers have been arrested and are being criminally prosecuted, and will be arrested and criminally prosecuted, with resultant interference with interstate commerce, for failure to hold a permit or certificate of convenience and necessity from the Arkansas Commission under the Arkansas statute, with no word or syllable of record supporting the foregoing finding that these drivers have been asked "to do nothing except apply for a permit", or that they are being criminally prosecuted for failure to make such application.

For example, the Supreme Court of Arkansas, **P. S. C. v. Fry**, 219 Ark. 553, 554, said:

"Thereupon said officers arrested the driver for violation of the aforementioned Act in that neither he nor Whittington held a permit or certificate of con-

venience and necessity from the Arkansas Public Service Commission." (Emphasis supplied.)

Further, the answer of the Commission filed in the trial court (R. 21) clearly shows the position of the Commission to be that the drivers are being prosecuted for failure to **have** as distinguished from failure to apply for, a permit or certificate; in addition, the Commission's enforcement officer testified that the drivers were arrested and criminally charged "for operating without a certificate or permit" as distinguished from "applying" for a permit or certificate or "identifying" themselves (R. pp. 129, 132, 133, 138). The position of the Commission that, under the Arkansas statute, it is authorized to arrest the drivers and interfere with interstate commerce until a certificate or permit has been **issued** by the Commission is clearly demonstrated by the testimony of the Commission's enforcement officer appearing at page 138 of the record:

"Q. Had you not been restrained by this Court, you would have continued to arrest these drivers every time you stopped them?

A. Where I found a violation of the law it was my duty to arrest them.

Q. If the driver told you he owned the equipment which he had leased to Whittington and that he was employed by Fry Roofing Company, then you would have arrested him?

A. Well, I suppose so.

Q. And you will resume those arrests if this injunction or restraining order is not made permanent?

A. My job is to keep them from operating illegally on the highways **until they get a permit to operate.**" (Emphasis supplied.)

And now, in this same connection, we direct the attention of the Court to that additional portion of the opinion

herein upon which the holding is based, appearing at page 4 thereof, as follows:

“And the State Commission here expressly disclaims any ‘discretionary right to refuse to grant a permit for contract carriage where that carriage is interstate commerce.’ The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency.”

Here the opinion does two things, both in violence to a proper disposition of the issues in this cause upon the record as certified to this Court. First, it bases the holding herein upon a purported representation as to disclaimer by the Commission of any “discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce.”

Such alleged disclaimer, being the foregoing quotation appearing in the opinion, is lifted bodily from the brief filed belatedly on behalf of respondents, with which we were not served prior to argument of the cause before this Court. When we did have opportunity to read the brief in which this “disclaimer” was contained our reaction was that same was so obviously mere “lawyer talk,” and so thoroughly at variance with the position assumed of record below by the Commission, the holding of the Arkansas Supreme Court, and the authority vested in the Commission by the Arkansas Motor Carrier Act, that it would be readily recognized for what it was and so dealt with by this Court, and that to dignify same by pointing out the apparently obvious was not indicated. That in this assumption we were wrong is no more clearly demonstrated than by the fact that the holding of the Court herein is predicated upon this position assumed by respondents in brief. The late-filed brief, rather than the certified record which it contradicts, is erroneously made the basis for the opinion herein.

Considered in this same connection should be the finding on page 4 of the opinion herein that "The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency."

It is interesting to note that this new position was not assumed by respondents in the pleadings below, in brief before the Supreme Court of Arkansas, nor in the brief of respondents in opposition to the petition for writ of certiorari filed herein, wherein "obtaining" a certificate or permit was treated as the prerequisite for avoiding criminal prosecution, with no intimation to the effect that the state simply wanted the drivers to "register" or "identify themselves."

The purpose of this switch in positions is obvious—to avoid the impact of the opinion of this Court in **Buck v. Kuykendall**, 267 U. S. 307, as well as of Article I, Section VIII, Clause III, of the Constitution of the United States, Part II of the Interstate Commerce Act, 49 Stat. L. 543, as amended, U. S. Code, Title 49, Chapter 8, Sec. 301 et seq., and to ignore the limitations placed upon the authority of the Arkansas Commission by the Arkansas Motor Carrier Act, Act 367, Acts of Arkansas 1941.²

In the first place, the Arkansas Public Service Commission is a state agency created by statute and vested only with the authority prescribed by statute. We say with all the emphasis at our command that nowhere in the Arkansas statute is the Commission vested with express or implied authority to require the drivers to "register with the appropriate agency" or "identify themselves as users of that state's highways," or to criminally prosecute a driver or

² It is not believed that this belated disclaimer is sufficient to bring into play the ruling in **Clark v. Poor**, 274 U. S. 554, where the Commission recognized, before the suit was begun, that, under the statute there in question, it had no discretion but to grant a permit where the carrier was engaged exclusively in interstate commerce.

carrier for failure so to do. And neither, by the same token, can the Commission lawfully waive or disclaim intention to comply with the positive mandates of the statute.

We believe that, in large measure, the opinion herein results from the unfortunate substitution, at page 4 thereof, of the word "may" for the word "shall" in referring to the provisions of Section 11 of the Arkansas Motor Carrier Act. We respectfully present that when the Act is properly read the opinion herein in and of itself necessitates a different conclusion. At page 4 of the opinion herein this Court said:

"Section 11 of that Act [Arkansas Motor Carrier Act] requires contract carriers to get a permit and outlines certain considerations the state commission **may** weigh in granting or refusing the permit. Among these matters is the adequacy of transportation services already being performed by 'any railroad, street railway or motor carrier.' Refusal of a state certificate based on such grounds was held to be an unconstitutional obstruction of interstate commerce in **Buck v. Kuykendall**, 267 U. S. 307. To deny these interstate carriers an Arkansas permit for such reasons would conflict with the **Buck** holding." (Emphasis supplied.)

We are to assume, of course, that this Court does not propose to hold that the Arkansas Commission in dealing with interstate commerce may ignore the plain statutory language in fulfilling the obligations upon it resting, or that the Commission may exercise powers not delegated to it by the Arkansas Legislature.

In contradistinction to the use of the word "may" in the opinion herein, Sections 11 (d) et seq. of the Arkansas Motor Carrier Act, Act 367, Acts of Arkansas 1941, dealing with permits of contract carriers by motor vehicle, provide:

"No permit shall be issued by the Commission **except** upon a hearing at least twenty (20) days after service of notice to interested parties of the time and place thereof. (e) In granting applications for permits the Commission **shall** take into consideration the reliability and financial condition of the applicant and his sense of responsibility toward the public; the transportation service being maintained by any railroad, street railway or motor carrier; the likelihood of the proposed service being permanent and continuous throughout 12 months of the year, and the effect which such proposed transportation service may have upon existing transportation service and any other matters tending to show the necessity or want of necessity for granting said application. (f) The Commission **shall specify** in the permit the business of the contract carrier covered thereby and the scope thereof and **shall** attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier the requirements established by the Commission under this Act; (h) No permit shall be issued for a total mileage in excess of twenty percent (20%) of the total mileage within the State Highway System."

The assumption would not be too violent, we take it, that the Arkansas Commission will so enforce the Act as to effectuate the ends set forth in Section 2 thereof; similarly, that it will issue no permit for contract carriage except after a hearing at which the Commission will follow the positive mandates of the statute and inquire into the fitness, willingness and ability of applicant, whether or not the proposed operation is in the public interest, the reliability and financial condition of the applicant, the transportation serv-

ice being maintained by any railroad, street railway or motor carrier, the likelihood of the proposed service being permanent and continuous throughout 12 months of the year, the effect which such proposed transportation service may have upon existing transportation services, and any other matters tending to show the necessity or want of necessity for granting said application. It is to be presumed, as well, that in effectuation of the purposes of said Act the Commission will grant or deny the permit upon the basis of its findings in the particulars above. Such perforce requires the exercise of discretion by the Commission.

Unless, therefore, it is the position of the Commission that it is not bound by the statute which it seeks to enforce, that it does not propose to observe the unequivocal mandates of the statute, and that it proposes simply, de hors the statute, to require operators of motor vehicle equipment in interstate commerce to "register" or "identify themselves," then, in that event, the position assumed in brief of disclaiming any "discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce" is ill-taken, and the opinion and holding of the Court herein predicated thereon, combined with the substitution of "may" for "shall" in construction and application of the statute in question is, we respectfully submit, essentially erroneous.

Unless, therefore, it is to be assumed that the Arkansas Commission will disregard, entirely, the statute by which it is created and under which it operates, then the reasoning of the opinion herein relative to prematurity of the position that interstate commerce is being unduly burdened is without application.

True it is that " . . . the Arkansas Act imposes upon its Commission the duty of reconciling state regulation with that of the Interstate Commerce Commission . . . ,"

but no attempt so to do has been made by the Arkansas Commission; the Arkansas Act expressly precludes application thereof to private carriage, but neither below nor by the opinion herein has the status of petitioner as a private carrier been determined; while the transportation involved admittedly is interstate transportation, no step has been taken by the Arkansas Commission to determine the position of the Interstate Commerce Commission with respect thereto; and while the Commission under Sections (6) and (7) of the Act is empowered to administratively determine questions arising under the Act, either by itself or by joint hearings with authorities of the United States, or by the seeking of civil injunctive relief in the courts, no such attempt to seek a solution to the problem involved without interfering with and unduly burdening interstate commerce has been made, but the Commission has chosen, irrespective of consequences, to proceed by the criminal route.

Thus it is, while at one and the same time this Court says, "At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways," it also says that the judgment of the court below is affirmed, and the judgment of the court below sanctions criminal prosecution of the drivers, not for failing to properly "identify themselves" or to "register," but for failure to hold a permit of convenience and necessity issued by the Commission. The arrests continue; the criminal prosecutions go on, and interstate commerce has been, is being and will be unduly burdened and destroyed.

We cannot refrain from observing the significance of the further statement at pages 4-5 of the opinion, whereby another new consideration enters the picture:

"Such an identification is necessary, the Commission urges, in order that it may properly apply the state's

valid police, welfare, and safety regulations to motor carriers using its highways."

We do not understand such to be the position of the Commission in this case, and respectfully submit that if it were it could not be urged in good faith. The Court apparently alludes to the statement made in the last sentence on page 8 of respondents' belatedly-filed brief. Such statement, as we read it, is not subject to the interpretation placed thereon by the opinion herein.

In the first place, there is no issue raised in the record with respect to exercise of the state's police power, welfare, or safety regulations: as a matter of fact, by stipulation in the trial court, the temporary restraining order procured by petitioner was dissolved in order that no such question would be involved in the litigation and that the issue would be limited safety to the right of respondents under the state statute, to require the obtaining of contract carrier permits before the interstate commerce involved might be performed (R. pp. 19-20); and, in this same connection, it should be observed that the state statute involved invests the Arkansas Commission with **no police power or welfare authority**, and that the only safety regulations which it may promulgate or enforce are those which have been "or which may from time to time be prescribed by the Interstate Commission for contract carriers by motor vehicles engaged in interstate or foreign commerce." [Section 6 (a) (2), Act 367, Acts of Arkansas, 1941.]

The holding herein, while concluding that the judgment of the court below is affirmed, in reality does not constitute an affirmation thereof.

The Supreme Court of Arkansas held simply that, within the meaning of the Arkansas Motor Carrier Act, the truck-drivers involved were "contract carriers," and that they

were subject to arrest and criminal prosecution for failure to have certificates of necessity and convenience issued by the Arkansas Public Service Commission. To quote, the court said (219 Ark. 553, 557):

"In the light of the above we are of the opinion that the driver-owners involved in this litigation were **contract carriers** as defined in the section of Act 367 of 1941 quoted above and that they were therefore required to have a Certificate of Necessity and Convenience from the Arkansas Public Service Commission."

Section 11 (a) of the Arkansas Motor Carrier Act, Act 367, Acts of Arkansas, 1941, provides:

"No person shall **engage in the business** of a contract carrier by motor vehicles over any public highway in this state unless there is **in force** with respect to such carrier a permit issued by the commission, authorizing such persons **to engage in such business.**" (Emphasis supplied.)

The penal provisions of said Act are contained in Section 22 thereof; and the decision of the court below sanctions arrest and criminal prosecution of the drivers for failure to meet the requirements of Section 11 (a) thereof. In other words, it sanctions regulation of interstate motor carrier transportation by the Arkansas Public Service Commission, and prohibits any person from **engaging in the business** of a contract carrier by motor vehicles over any public highway in the State of Arkansas unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to **engage in such business.**

The opinion of the Court herein, we respectfully present, overlooks entirely the basic holding of the court below,

and while purporting to affirm same predicates its ultimate holding on the "use of the highways," principle, finding that a state may require a driver to "register," or "identify" himself as **a user of a state highway**. The case at bar contains no issue with respect to the right of a state to regulate use of its highways, in a field not pre-empted by Congress. The opinion, therefore, is not determinative of the material issue in the case at bar as to the power of the state commission to regulate engaging in the business of interstate transportation.

Conceding, as all parties to the litigation must, that the only transportation here involved is interstate transportation, the paramount issue inevitably is the extent to which a state commission may regulate and determine the right of a person to "engage in the business of a contract carrier by motor vehicles" in interstate commerce, a field pre-empted by Congress as heretofore set forth by us in brief and summarized at page 4 of the dissenting opinion herein.

Until this issue is determined, the judgment of the court below cannot be said to be affirmed.

While we agree with the dissenting opinion that Congress has pre-empted the field of interstate transportation here involved, precluding both inconsistent and overlapping state regulations, and that such should be determinative of this litigation, inasmuch as the opinion of the Court does not agree with this view, it appears then that determination of a number of the additional issues heretofore raised herein is necessary to proper disposition of the litigation.

And, at this point and for the following reasons, we concede that we find ourselves somewhat between the "rock and the hard place"; as well, the state of confusion in the motor carrier industry and in the various regulatory bodies

dealing therewith engendered by the opinion herein is one of substantial proportions.

This Court says **only** that our drivers shall "identify themselves," while, at the same time, the court below says that the drivers are subject to criminal prosecution for not having permits of convenience and necessity issued by the Arkansas Commission. Assuming, arguendo, that the truck drivers, engaged solely in interstate commerce, must apply for contract carrier permits, to whom should such application be made, the Arkansas Commission under the Arkansas statute or the Interstate Commerce Commission under the Federal Motor Carrier Act? Then, at that point it must be determined whether the transportation in interstate commerce is contract or private carriage; the Arkansas Act by its terms is precluded from application to private carriage, while the Federal Act defines both contract and private carriage, and the Interstate Commerce Commission has very carefully delineated the criteria to be applied in determining whether contract carriage is being performed. Shall, then, the conclusion of the court below that the definition of "contract carrier" in the Arkansas Act was intended to be "all inclusive" be applied or shall the definitions of the Federal Act and of the Interstate Commerce Commission relative to interstate motor carrier transportation be applied? Presumably, inasmuch as interstate transportation alone is involved, the provisions of Part II of the Interstate Commerce Act and the rules, regulations and decisions of the Interstate Commerce Commission thereunder must be applied in determining whether the transportation being performed is contract or private carriage.

Such being the case, consideration of the criteria established by the Interstate Commerce Act and Interstate Commerce Commission becomes imperative. No consideration whatsoever has been given thereto either by the court be-

low or in the opinion herein. The court below simply concludes that the drivers are "contract carriers" within the meaning of the state definition—and the opinion herein does not deal with the question.

For example, inasmuch as the only transportation being performed is of petitioner's merchandise, it becomes essential to ascertain (1) whether petitioner is a bona fide private carrier within the meaning of the "primary business test" enunciated by this Court and the Interstate Commerce Commission; if it is, then the truck drivers at one and the same time cannot be contract carriers in the performance of the same transportation. (2) It is essential that it be determined, as well, whether a bona fide employer-employee relationship exists between petitioner and its truck drivers, for, perforce, if the drivers are bona fide employees they cannot at one and the same time be contract carriers in performance of the same transportation. (3) With respect to the utilization of leased equipment in interstate transportation, it is imperative that it be determined whether the "direction and control" test enunciated by the Interstate Commerce Commission and approved by this Court has been met, or whether simple ownership of equipment is to be determinative of whether contract or private carriage is being performed. In this connection the court below says (219 Ark. 553, 555):

"Appellee says it has a right to lease transportation equipment and hire its own drivers and thereby become a private carrier just as it would concededly be if it owned said equipment outright, and as a general proposition we think this is true."

After such concession, which without question is correct, we strongly urge that the undisputed facts of record should have been considered and applied in determining whether petitioner is, in truth and in fact, a private carrier.

In other words, if it is not to be held that here the State is invading a field of commerce pre-empted by Congress, nevertheless, it being conceded that the transportation involved is solely interstate transportation, whether it is private or contract carriage must be determined by application of established Federal standards. Such has not been done.

And, finally, we respectfully present that before it can be determined whether an equipment lease arrangement is bona fide that actual operation thereunder must be examined and due consideration given thereto in determining whether contract or private carriage is being performed.

The record in this case is as clean as the proverbial "hound's tooth" on the proposition that a true employer-employee relationship existed between petitioner and its truck drivers; that petitioner exercised exclusive direction and control over the motor vehicle equipment and drivers thereof, irrespective of by whom the equipment was owned, and that the terms and provisions of the written equipment leases were scrupulously complied with in every respect.

It is significant that the courts in **United States v. LaTuff Transfer Service**, 95 F. Supp. 375, and cases therein cited, recognized that both the direction and control test and compliance with the provisions of equipment leases in actual operation were of paramount importance in determining the bona fides of the transportation being performed. We cannot but again direct the attention of the Court to the fact that upon the basis of the **LaTuff Case**, supra, and cases there cited, the Arkansas Public Service Commission promulgated its Conference Rule and Order in Case R-461 (R. 199-200) setting forth the criteria to be applied in determining whether private or contract carriage was being performed, and that the uncontroverted evidence is that every element of private carriage is present in the case at

bar (R. pp. 87 et seq., 38 et seq.), measured by the most rigid standards prescribed in any decision.

It is of more than passing significance that neither the court below nor this Court in its opinion has made any finding on the foregoing basic, uncontradicted, and undenied questions of fact. On presentation of the case, we endeavored, ineffectually it must be admitted, to point out the fundamental difference between basic findings and mere conclusions. The opinion herein, after stating that this Court is being urged "to set aside the findings of the State Supreme Court before passing upon the constitutional questions presented" goes on to state that the findings of the Arkansas Supreme Court "are not without actual foundation, and we accept them."

We cannot refrain, after a further careful reading of the opinion of the court below, from taking issue with the opinion herein as to what the findings of the court below actually were. The opinion herein, page 3, says:

"Reviewing the facts for itself, the State Supreme Court found that the arrested truck drivers were not petitioner's employees, that the truck lease arrangements were shams, and petitioner was therefore a shipper—not a carrier of any kind."

We respectfully submit that all the court below did was to conclude that the drivers were "contract carriers," with no reference to any factual basis for the conclusion. We respectfully take issue with the statement that the court below found the arrested truck drivers were not petitioner's employees—the opinion below, as we read it, makes no reference to the relationship between petitioner and the truck drivers. Further, we respectfully take issue with the finding that the court below found petitioner to have been "a shipper—not a carrier of any kind." No finding at all as to petitioner's status appears in the opinion below.

And, finally, we respectfully take issue with the statement that the court below found "that the truck lease arrangements were shams." What the court below did say in this connection was (219 Ark. 553, 557):

"It seems to us that the arrangements made by appellee to deliver its own products as set forth above amount only to a clever plan to circumvent the letter and spirit of the law."

We respectfully present that if all of the plans formulated and utilized by modern business designed, within permissible limits, to circumvent or avoid the impact of legislation of various types were, for such reason alone, declared to be "shams" then, in that event, a major portion of the systems and methods of operation of modern business enterprises would forthwith be declared illegal.

Without laboring the point, take for example the numberless plans evolved and put into operation designed solely for the purpose of circumventing both state and federal tax laws. So long as effectuation thereof is not prohibited by law, the relationships between the parties are entered into in good faith, and the plans complied with in actual operation, the simple fact that thereby the impact of some piece of legislation is avoided is not sufficient to imbue the plan with illegality.

In the case at bar admittedly private carriage, over which the Arkansas Commission has no jurisdiction under the state Act, can be performed by petitioner by the use of leased equipment and the employment of its own drivers. Admittedly the written equipment leases set forth the terms thereof. Other than in the trial court below we have been unsuccessful in obtaining any finding with respect to any factual element material to and determinative of the question whether private or contract carriage was being performed.

The court below having concluded that the definition of "contract carrier" in the Arkansas Act was "all inclusive" and that, perforce, the truck drivers were "contract carriers" went on frankly to say that:

"Much of the testimony introduced at the hearing below need not be recounted or considered, under our view of the matter . . ." (219 Ark. 553, 555).

This court in adopting what it terms the findings of the court below presumably also has not taken into consideration "much of the testimony introduced at the hearing below."

We seek here to have this Court do only what the learned Justice speaking for the Court in this case has heretofore said the Court should do, and that which the Court has heretofore done, in determining legality of a transaction, i. e., to determine the legality of an arrangement by seeing "what was actually done" thereunder. In this connection Mr. Justice Black in **United States v. City and County of San Francisco**, 310 U. S. 16, 28, said:

"Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the city and the power company to see what was actually done we see, etc. . . ."

All we here ask is that this Court consider the evidence which has heretofore been neither recounted nor considered, see "what was actually done," and when such is done we are convinced that the Court will find, upon the record as made, that petitioner is a bona fide private carrier engaged solely in interstate commerce, that a true employer-employee relationship exists between petitioner and his truck drivers, that petitioner has had and exer-

Arkansas Public Service Commission

CHAS. C. WINE, CHAIRMAN

JOHN R. THOMPSON
COMMISSIONER



RICHARD McCULLOCH, JR.
COMMISSIONER

Little Rock, Arkansas

December 8, 1949

Messrs Wrape and Hernly, Attorney
Sterick Building
Memphis, Tennessee

Attention: Mr. James W. Wrape

Re: State of Arkansas vs. Boshers
pending Justice of the Peace
Court, Long's Court, Carlisle,
Arkansas

Dear Mr. Wrape:

Your letter of December 2, 1949, reached my desk during my absence and I am informed by the Enforcement Officers that the case was heard and disposed of yesterday, resulting in a fine of \$90.00 and cost, a total of \$100.00.

With regard to the photostatic copies of lease attached to your letter, a reading of the lease attached would indicate that there is perhaps not too much wrong with the lease itself, but I am also advised that an investigation by this Commission and the Interstate Commerce Commission indicates that the lease is not being complied with. In other words the actual operation is not consistent with the lease.

With best wishes for the Holiday Season, I am

Sincerely yours,

CHAS. C. WINE, CHAIRMAN

CCW:GW

cised exclusive direction and control over the operation of motor vehicle equipment and the drivers thereof, that the equipment lease agreements have been scrupulously complied with in actual operations thereunder, and that no element of contract carriage within the meaning of Part II of the Interstate Commerce Act or the rules, regulations and decisions promulgated and rendered thereunder by the Interstate Commerce Commission is present, and that, irrespective of all other considerations, the Arkansas Act has no application to such private carriage.

If merely to "register" or to "identify" the operators of equipment using the highways of Arkansas were authorized and would suffice to satisfy the State's requirements we would readily concede that such would not constitute an undue burden on interstate commerce, but such, as a practical matter, as pointed out aforesaid, furnishes no response to the criminal charges now being pressed by the Arkansas Commission, and neither will the mandates of the Arkansas Act be satisfied thereby.

Neither are we at variance with the principle that a state may lawfully require the holding of a permit for the use of its highways in performance of interstate commerce or contract transportation, where such permit must be granted as a matter of course and without discretion on the part of the Commission, and within limits permitted by federal authority. Before, however, even such non-discretionary permit may be required it must first be established that common or contract carriage, as defined by federal legislation and regulation of federal regulatory bodies, is being performed. Not only is there complete absence of such finding in the case at bar, but, as well, it is established that the Arkansas statute makes it mandatory that its commission weigh all of the features contained in Section 11 (a) of the Act and grant or deny applications upon the basis of its findings therein. Such

necessitates the exercise of discretion. Such constitutes unlawful regulation of interstate commerce.

For the reasons aforesaid, petitioner respectfully requests a rehearing in this cause.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
Attorneys for Petitioner.

Of Counsel:

WRAPE and HERNLY.

CERTIFICATE.

I, Glenn M. Elliott, of counsel for petitioner in the above styled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

Witness my hand and seal this the 3rd day of January, 1953.

Glenn M. Elliott,
Of Counsel for Petitioner.

**SUPPLEMENT TO
PETITION
FOR REHEARING
Filed
ON BEHALF OF
PETITIONER**

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FILED

MAR 4 1953

HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

v.

SCOTT WOOD et al., Individually and as Members
of and Composing the Arkansas Public
Service Commission,
Respondents.

SUPPLEMENT TO PETITION FOR REHEARING
FILED ON BEHALF OF PETITIONER.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
2111 Sterick Building,
Memphis, Tennessee,
Counsel for Petitioner.

Of Counsel:

WRAPE and HERNLY,
1624 Eye Street,
Washington 6, D. C.

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Service Commission,
Respondents.**

SUPPLEMENT TO PETITION FOR REHEARING FILED ON BEHALF OF PETITIONER:

Comes petitioner, Lloyd A. Fry Roofing Company, and respectfully submits this supplement to its petition for rehearing filed in the above cause on January 3, 1953, as follows:

The supplement does not seek to enlarge the specification of errors heretofore presented, but seeks to supply the Court with pertinent information recently coming to the attention of counsel for petitioner.

J. B. Boshers was one of the drivers whose arrest by Arkansas officials precipitated this litigation (R. p. 113). The lease covering his equipment was the uniform form (Stip. R. p. 243; Ex. 26, R. p. 196, Ex. 1 to Dep. R. p. 27).

The opinion of the Supreme Court of Arkansas is predicated solely and alone upon findings and conclusions resulting from an analysis of the equipment lease forms, *supra*, executed by Whittington and the driver-owners, and the leasing agreement between Whittington and the Lloyd A. Fry Roofing Company (R. p. 7 et seq.), with no consideration whatsoever being given to evidence of record with respect to actual operations conducted thereunder. See **Public Service Commission v. Fry**, 219 Ark. 533 et seq.

Neither, if we correctly read the opinion herein, did this Court go any further in considering the factual situation reflected by the record than did the Arkansas Supreme Court, which admittedly did not consider "much of the testimony introduced at the hearing . . ." (**Public Service Commission v. Arkansas**, 219 Ark. 553, 555).

Heretofore in our petition for rehearing we have pointed out, with record references, to the inconsistency between the position assumed by the Arkansas Public Service Commission upon the trial of this cause and that now assumed by such Commission in brief as to its conception of its powers and the obligations of the affected drivers under and by virtue of the Arkansas Motor Carrier Act. This Court, as we pointed out, erroneously followed the "brief position" of the Arkansas Commission, first assumed in this Court, without taking cognizance of the contra posi-

tion assumed, under oath, by officials of the Arkansas Commission, and the stark reality of the pending criminal actions. Thus, in that respect, a grave and substantial inconsistency is demonstrated of record.

By this supplement to the petition for rehearing we wish to direct the attention of the Court to another inconsistency of equal gravity and magnitude. The opinion of the Arkansas Supreme Court, approved by this Court, is predicated upon the assumption that the Arkansas Public Service Commission **challenged the equipment leases involved**. Such, as a matter of fact, is not the case. We knew, upon trial of the cause, that the Arkansas Commission had approved the form of equipment leases, and challenged only actual operations thereunder. We had been so advised by members of the Commission, but no commissioner attended the trial or presented himself as a witness and we were not afforded opportunity to cross-examine a commissioner on this point.

We now learn, and so advise the Court, that after an examination of the lease in the **Boshers** case, supra, the chairman of the Arkansas Public Service Commission, following the arrest of Boshers, wrote on December 8, 1949:

"With regard to the photostatic copies of lease attached to your letter, a reading of the lease attached would indicate that **there is perhaps not too much wrong with the lease itself**, but I am also advised that an investigation by this Commission and the Interstate Commerce Commission indicates that the lease is not being complied with. In other words the actual operation is not **consistent with the lease**." (Emphasis supplied.)

In other words, the opinion of the Arkansas Supreme Court, affirmed herein, is not consistent with the position

assumed by the Arkansas Public Service Commission. We have vigorously urged that "actual operation" under the leases was established by the record to be consistent therewith, knowing, as we did, that it was not the form of the lease but "actual operation" thereunder that was challenged by the Commission. "Actual operation" has not, however, been referred to either by the Supreme Court of Arkansas, or by this Court in the opinions filed.

Frankly, as members of the bar of this Court, we represent to the Court that on the date this supplement to petition for rehearing was dictated, i. e., February 27, 1953, we were first advised of the existence of the foregoing letter. Its existence was then discovered by accident. There is no excuse which we can offer except that of clerical ineptitude. By mischance the letter was stapled on the back of an unrelated document and misfiled, without ever having been brought to the attention of counsel for petitioner. If thereby petitioner shall be damned then petitioner stands damned.

Knowing full well, however, that the concern of this Court is to see that justice be done, irrespective of technicality, we have persuaded ourselves that we should take the risk of such castigation as may be our lot by directing the attention of the Court to the above matter which, admittedly, is de hors the printed record. The original of the letter to which reference is made, having been signed by the Honorable Charles C. Wine, chairman of the Arkansas Public Service Commission, is reproduced as an appendix hereto. It would have been filed upon hearing of the cause had counsel known of its existence.

Our thinking is that this letter, without peradventure of a doubt, establishes the existence of a further inconsistency between the position of the Arkansas Public Service Commission and the position attributed to the Commis-

sign and discussed at such length by the Arkansas Supreme Court in its opinion, affirmed by this Court in its sharply divided opinion.

We sincerely believe that, by virtue of the matters presented in the petition for rehearing filed on January 3, such rehearing should be granted and the matter disposed of in this Court on the record as made. If, however, perchance we should be misguided in our thinking we firmly believe, as well, that the information contained in the appendix hereto is sufficient to justify, nay even demand, that the case be remanded to the Supreme Court of Arkansas with instructions that it consider the evidence of record and make findings of fact with respect to whether "actual operation" was consistent with the equipment lease agreements. Until the evidence of record is considered the issues in the case will not have been determined in the light of the law applicable thereto as it will finally be enunciated by this Court.

Insofar as we are advised no response to the petition for rehearing has been filed, and we assume, therefore, that no response hereto will be filed. We assure the Court, however, that we have no objection whatsoever to respondents being granted any additional time which they may wish for the preparation and filing of response hereto.

For the reasons heretofore presented, petitioner respectfully requests a rehearing in this cause.

JAMES W. WRAPE,
GLENN M. ELLIOTT,

2111 Sterick Building,

Memphis, Tennessee,

Attorneys for Petitioner.

Certificate.

I, Glenn M. Elliott, of counsel for petitioner in the above styled cause, do hereby certify that the foregoing supplement to petition for rehearing is presented in good faith and not for delay, and that the relief sought is restricted to the grounds specified therein.

Witness my hand and seal this the 27th day of February, 1953.

(s) Glenn M. Elliott,
Of Counsel for Petitioner.